96.

Supreme Court, U.S.
FILED
MAY 20 2008
OFFICE OF THE CLERK

No. (1) 071454

In The
Supreme Court of the United States

FASHION VALLEY MALL, LLC,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 432.M,

Real Party In Interest.

On Petition For Writ Of Certiorari To The California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the California Supreme Court's failure to consider Petitioner's property rights, and failure to consider this Court's "public forum doctrine" in balancing free speech and property rights, when it expanded the scope of the public easement to "speak" effectively dedicated in *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899 (1979)[1] to include speech calculated to interfere with a privately owned shopping center's commercial functions result in an improper taking under the Fifth Amendment of the United States Constitution?

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[1] To avoid confusion between the California Supreme Court's decision and this Court's decision, Petitioner will refer to the California Supreme Court's decision as "*Robins*," and to this Court's decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) as "*PruneYard*."

CORPORATE DISCLOSURE STATEMENT

Fashion Valley Mall, LLC, a Delaware limited liability company, is the current owner of the Fashion Valley Shopping Center and is the successor-in-interest to the Equitable Life Assurance Society of the United States and ITC Fashion Valley Corporation d/b/a Fashion Valley Shopping Center.

Fashion Valley MM, LLC, a Delaware limited liability company, owns Fashion Valley Mall, LLC.

Simon Property Group, L.P., a Delaware limited partnership, owns 50% of Fashion Valley MM, LLC. Simon Property Group. Inc., a Delaware corporation, which is publicly traded on the New York Stock Exchange, is the general partner of Simon Property Group, L.P.

PPF RTL 352 Fashion Valley, LLC a Delaware limited liability company, owns 49.9% of Fashion Valley MM, LLC.

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PETITION FOR A WRIT OF CERTIORARI

Fashion Valley Mall, LLC, respectfully petitions for a writ of certiorari to review the opinion and judgment of the California Supreme Court.

OPINIONS BELOW

Responding to a request by the U.S. Circuit Court of Appeals for the District of Columbia to consider a question of California constitutional law, the California Supreme Court published its opinion at *Fashion Valley Mall, LLC v. N.L.R.B.*, 42 Cal.4th 850 (2007). The California Supreme Court filed a one-page order denying Petitioner's Petition for Rehearing on February 20, 2008.

The U.S. Circuit Court of Appeals for the District of Columbia published its opinion and requested that the California Supreme Court consider a question of law at *Fashion Valley Mall, LLC v. N.L.R.B.*, 451 F.3d 241 (D.C. Cir. 2006).

JURISDICTION

The California Supreme Court issued its opinion on December 24, 2007, and denied Petitioner's timely Petition for Rehearing on February 20, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

This Court has held that it has jurisdiction to consider an issue raised in a petition for rehearing.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476 (1975). Petitioner, in its January 8, 2008, Petition for Rehearing, asked the California Supreme Court to consider the Fifth Amendment issues raised by the manner in which it answered the question certified by the U.S. Circuit Court of Appeals for the District of Columbia.

CONSTITUTIONAL PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment,[2] provides: "[N]or shall private property be taken for public use, without just compensation."

The First Amendment of the United States Constitution as interpreted by this Court in *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985) and *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983). The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[2] *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239, (1897).

Article I, section 2, subdivision (a) of the California Constitution as interpreted by the California Supreme Court in *Fashion Valley Mall, LLC v. N.L.R.B.*, 42 Cal.4th 850 (2007) and *Robins v. Pruneyard Shopping Center, supra*. Article I, section 2, subdivision (a) provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

STATEMENT OF THE CASE

On October 3, 1998, the Graphics Communications International Union ("Union") used the Fashion Valley shopping center as a forum for public communication ("public forum"[3]) without submitting an application for a permit. Petitioner's predecessor-in-interest asked the Union to stop using the shopping center as a public forum because the Union had not submitted an application for a permit, not because the Union was violating any substantive rule regulating the use of the shopping center as a public forum.

[3] Petitioner is not using the term "public forum" as a collective description for a "traditional" and "designated" public form as opposed to a "non-public" forum. Rather, the term simply refers to the speaker's use of any property as a forum to communicate with members of the public.

The Union's demonstration precipitated a review of the use by Petitioner's predecessor-in-interest of an application and permit procedure and several substantive rules by a National Labor Relations Board ("NLRB") Administrative Law Judge. The NLRB, however, eventually focused its decision on a single substantive rule, a boycott prohibition, even though the Union was not asking shoppers to boycott any one of the Fashion Valley stores, and, had the Union submitted an application, the reviewed boycott prohibition would not have prevented the Union from getting a permit to distribute the leaflets the Union was using. The distributed leaflets, in addition to disclosing the existence of a labor dispute with the San Diego Union-Tribune Publishing Co. and the fact that the Robinsons-May department store advertised in the San Diego Union-Tribune, only asked shoppers and the employees of the Robinsons-May department store to call the CEO of the San Diego Union-Tribune Publishing Co.

Nothing in the shopping center's regulations, including the boycott prohibition, caused the Union to refrain from asking shoppers to boycott the Robinsons-May department store. The Union representative who organized the demonstration testified at trial that he did not apply for a permit because he did not know the shopping center regulated the use of its property with an application and permit procedure.

On October 15, 1998, the Union filed a "Charge Against Employer" with the NLRB. The Union claimed that its right to leaflet on the shopping center

without submitting an application was protected by Section 552.1 of the California Penal Code as interpreted by *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union*, 61 Cal.2d 766 (1964).

On or about September 30, 1999, the NLRB filed a complaint against Petitioner's predecessor-in-interest charging it with having engaged in unfair labor practices. The complaint alleged that the Union was distributing handbills to members of the public in front of the Robinsons-May department store. The complaint alleged that these handbills communicated information about a labor dispute with the San Diego Union-Tribune Publishing Co., and informed members of the public that one of the Robinsons-May department stores advertised in the San Diego Union-Tribune. The complaint alleged that Petitioner's predecessor-in-interest was using an application and permit procedure which improperly: (1) required an application to be submitted before using the shopping center as a public forum, (2) required the owner's approval of the application, (3) [even though the complaint did not allege that the Union was asking shoppers to boycott the Robinsons-May department store[4]] required the disclosure of an intent to discourage customers from shopping at a store in the shopping center and

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[4] As noted above, the distributed handbill only asked shoppers and the employees of the Robinsons-May department store to call executives at the Robinsons-May department store and the San Diego Union-Tribune Publishing Co.

prohibited urging customers to refrain from shopping at a store in the shopping center, (4) required the identification of the participants, and (5) failed to assure that the information provided will be kept confidential.

1. The Trial Proceedings

On October 10, 2000, NLRB Administrative Law Judge William L. Schmidt ("ALJ Schmidt") presided over the trial of the unfair labor complaint filed by the NLRB.

On September 26, 2001, ALJ Schmidt issued his decision.[5] ALJ Schmidt held that the California Constitution did not define a labor union's right to use private property as a public forum. ALJ Schmidt held that California real property law, not California constitutional law, controlled labor unions' rights to use private property as a public forum. Relying solely on an argument submitted by the Union's counsel, and ignoring the leaflet and the testimony, ALJ Schmidt also found that the Union was attempting to persuade shoppers to boycott the Robinsons-May department store.

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[5] See *Equitable Life Assurance Society of the United States and ITC Fashion Valley Corporation d/b/a Fashion Valley Shopping Center and Graphic Communications International Union, Local 432M, AFL-CIO*, 343 NLRB 441 (2001).

2. The Decision of the National Labor Relations Board.

On December 20, 2001, the NLRB had used the same interpretation of California real property law to find that another union had the right to demonstrate in front of a free-standing retail store.[6] – *Waremart Foods*, 337 NLRB 41 (2001). On January 16, 2004, the U.S. Circuit Court of Appeals for the District of Columbia rejected this interpretation of California real property law – *Waremart Foods v. N.L.R.B.*, 354 F.3d 870 (D.C. Cir 2004). The D.C. Circuit Court found that the California constitution as interpreted by *Robins*, controlled any speaker's right to use private property as a public forum. The D.C. Circuit Court also found that the NLRB reading of California real property law which freed labor speech from the constitutional restrictions on the use of private property as a public forum have been unconstitutional.

On October 29, 2004, the NLRB issued its decision – *Equitable Life Assurance Society, etc.*, 343 NLRB 438 (2004). Having lost in *Waremart Foods* the argument that California constitutional law did not define a labor union's right to use private property as a public forum, the NLRB looked at the California Constitution and concluded that a boycott prohibition was an unconstitutional content-based regulation of speech. The NLRB issued an order preventing Petitioner from

[6] *Robins* had extended the California constitutional protection of speech to shopping centers.

using the reviewed boycott prohibition, as well as any other boycott prohibition.

3. The Opinion of the U.S. District Court of Appeals.

On June 16, 2006, the D.C. Circuit Court issued its opinion and request that the California Supreme Court considered a question in this matter – *Fashion Valley Mall, LLC, supra*. The D.C. Circuit Court reversed ALJ Schmidt's finding that the Union had asked shoppers to boycott a store in the shopping center. And, the D.C. Circuit Court gave the California Supreme Court the opportunity to resolve an undecided issue of California constitutional law – whether a private property owner had the power, under the California constitutional protection of speech, to prevent speakers from using its shopping center as a public forum for asking shoppers to boycott one or more of the stores in the shopping center.

4. The Opinion of the California Supreme Court.

On August 16, 2006, the California Supreme Court granted the request of the D.C. Circuit Court to consider a question of law presented in the matter pending for the D.C. Circuit Court.

Petitioner submitted the same arguments in support of a boycott prohibition to both the D.C. Circuit Court and the California Supreme Court.

Petitioner relied heavily on the California Second District Court of Appeal's holding in *H-CHH Associates v. Citizens for Representative Government*, 193 Cal.App.3d 1193 (1987) that a shopping center owner had the power to prohibit speech which would economically interfere with the businesses of the shopping center's stores. *H-CHH Associates* held that the shopping center owner had the power to prevent competition with the business of the shopping center's stores resulting from requests for the shoppers' funds. Petitioner argued that, if a shopping center owner had the power to prevent the incidental and mild economic interference which could be caused by taking a few dollars out of shoppers' pockets, a shopping center had the power to prevent the intended and more drastic economic interference which would be caused by shoppers not shopping at one or more of the shopping center's stores.

The majority opinion in *H-CHH Associates* gave shopping centers the power to protect stores from economic interference without discussing or applying this Court's "public forum doctrine." Petitioner, therefore, argued that this power could be justified by either (1) putting privately owned shopping centers in the "non-public" forum category, (2) not using the literal definition of content neutrality, or (3) using the *H-CHH Associates* recognized substantial or compelling interest in preventing economic interference to justify the shopping center's use of a content-based regulation that was narrowly drawn and viewpoint-neutral.

On December 24, 2007, the California Supreme Court issued its decision – *Fashion Valley Mall, LLC v. N.L.R.B.*, 42 Cal.4th 850 (2007). The California Supreme Court, in a deeply divided four-to-three decision, found that a boycott prohibition was a content-based regulation of speech and that privately owned shopping centers did not have the substantial or compelling interest in preventing economic interference needed to justify the use of a content-based regulation. The four-justice majority did not discuss, use or reject the use of this Court's "public forum doctrine." The majority applied the regulatory standard applicable, under this Court's "public forum doctrine," to a "traditional" or an owner-designated public forum without any discussion of public forum categories. Recognizing that the relevant holding in *H-CHH Associates*, even when applied to soliciting funds, was inconsistent with the majority's view of a privately owned shopping center's regulatory power, the majority reversed the relevant *H-CHH Associates* holding.

The three-justice minority explained why they would overrule *Robins, supra*. The minority would follow the U.S. Supreme Court's interpretation of the scope of the First Amendment as well as the rejection, or substantial limitation, by all (i.e., 21) but one of the states which have been asked to adopt a *Robins* extension of state constitutional protection of speech

to private property.[7] Even if *Robins* were not overruled, the three-justice minority would permit shopping center owners to prohibit speech that contravened the property's existence. The three-justice minority pointed out that the speech protected in *Robins* was compatible with the normal use of the shopping center. In contrast, urging a boycott contradicts the purpose of the shopping center's existence.

On January 8, 2008, Petitioner filed a Petition for Rehearing requesting that the California Supreme Court consider the U.S. Constitutional issues raised by the manner in which the majority had answered the question certified by the D.C. Circuit Court. This Court, in its review of *Robins*, found that what Mr. Robins and his classmates were "saying" and doing presented no risk of interference with normal business operations. *PruneYard, supra,* at 77, 83. In deed, this Court noted that the California Supreme Court

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[7] *Fashion Valley Mall, LLC v. N.L.R.B.*, 42 Cal.4th 850, 874-878 (2007). Arizona, Connecticut, Georgia, Hawai'i, Iowa, Michigan, Minnesota, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, and Wisconsin, have "rejected" the *Robins* approach. Illinois, Nebraska, and Nevada have cited but declined to follow *Robins*. Washington has "very narrowly confined" its state constitutional protection of speech. Massachusetts' state constitutional protection of speech has always been limited to gathering the signatures political candidates need to get on the ballot. Colorado has recently permitted shopping centers to adopt "substantial restraints on the exercise of free speech." Only New Jersey continues to use a *Robins*-like state constitutional protection of speech on privately owned shopping centers.

had given the shopping center owner the power to adopt regulations to assure that the use of the shopping center as a public forum did not interfere with normal business operations. *PruneYard, supra,* 447 U.S. at 78 and 84 (1980).

In the Petition for Rehearing, Petitioner also asked the California Supreme Court to address the "public forum doctrine" issues Petitioner had raised after it had determined whether California would adopt this Court's "public forum doctrine" in *San Leandro Teachers Association v. San Leandro Governing Board.* On August 28, 2007, which was after all briefs had been filed, the California First District Court of Appeal held that California had adopted this Court's "public forum doctrine." On November 28, 2007, which was after oral argument, the California Supreme Court granted a petition for review of the First District Court of Appeal's decision.

Under this Court's "public forum doctrine" the government agency in control of public property dedicated to nonpublic forum purposes can use content-based regulations of speech – the regulation need only be a viewpoint-neutral, reasonable attempt to prohibit speech incompatible with the dedicated non-public forum uses of public property. If the California Supreme Court approved the adoption of this Court's "public forum doctrine," Petitioner submitted that private property owners must be given the same power to protect their primary nonpublic forum uses of the shopping center.

On February 20, 2008, the same four-justice majority of the California Supreme Court voted to deny Petitioner's Petition for Rehearing. The same three-justice minority voted to grant this Petition.

SUMMARY OF ARGUMENT

This Court, since it decided *PruneYard* in 1980, has limited the government's authority to force private property owners into allowing the general public to use their property in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374 (1994). The California Supreme Court's decision ignored Petitioner's property rights and failed to consider the effect of *Nollan* and *Dolan.* The greater protection now provided by these cases for private property rights requires this Court to reconsider its view of the role of the Takings Clause in the government's preventing a privately owned shopping center from excluding speech intended to interfere with the shopping center's commercial function.

This Court, since it decided *PruneYard* in 1980, has also articulated and applied a "public forum doctrine" to determine when and how the government may regulate or exclude speech and free speech activities on public property in *Cornelius v. NAACP Legal Defense and Education Fund, Inc.,* 473 U.S. 788 (1985) and *Perry Education Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37 (1983). On the public

property which the government has been required by long tradition to hold open for public assembly and general debate, as well as any public property the government has voluntarily opened for the same, this Court's "public forum doctrine" prohibits the government from using a content-based regulation of speech and free speech activities without a substantial or compelling interest for the use of such regulations. The regulation must also be narrowly tailored to protect a substantial or compelling interest. In contrast, on public property which the government has dedicated to nonpublic forum uses, this Court's "public forum doctrine" permits the use of content-based regulations to exclude speech and free speech activities incompatible with the primary dedicated uses of the property. The regulation need only be viewpoint-neutral and reasonably designed to preserve the primary dedicated uses of the property.

The California Supreme Court's decision in *Fashion Valley Mall* ignored the obvious functional differences between the public property this Court has placed in the "traditional" or "quintessential" public forum category and a privately owned shopping center. The California Supreme Court's decision also ignored the obvious functional similarities between the property this Court has placed in the "nonpublic" forum category and a privately owned shopping center. The greater protection of property rights now provided by *Nollan* and *Dolan* requires this Court to consider the role of this Court's "public

forum doctrine" in applying the *Nollan* and *Dolan* requirements.

ARGUMENT

Petitioner is not asking this Court to reconsider its decision in *PruneYard*. The free speech activity is different in the case at bar. The scope of the public access easements effectively dedicated by *Robins* and *Fashion Valley Mall, supra,* dissenting opinion, are different. And, this Court has revisited and revised its interpretation and application of both the First and Fifth Amendments of the U.S. Constitutional law since it decided *PruneYard* in 1980.

The PruneYard Shopping Center objected to the loss of the right to exclude all uses of the shopping center as a public forum, including uses which would not interfere with the shopping center's commercial function. In contrast, Petitioner is objecting to the loss of the right to exclude the use of its property to deliver a message which "contradicts the very purpose of the shopping center's existence."[8]

The public access easement effectively dedicated in *Robins* sanctioned the exclusion of free speech activities which interfered with the shopping center's

[8] *Fashion Valley Mall LLC v. N.L.R.B.*, 42 Cal.4th 850, 870 (2007), dissenting opinion.

commercial function.[9] In contrast, the public access required by *Fashion Valley Mall* is the functional equivalent of a public access easement for speech which is intended to interfere with the shopping center's commercial function. *Fashion Valley Mall* prevents the exclusion of speech from the common areas of a privately owned shopping center calculated to keep shoppers from shopping in one or more of its stores apparently because the government does not have the power to exclude this message on that species of public property which this Court has identified as a "traditional" public forum or a "quintessential" public forum.

When the California Supreme Court decided *Robins* in 1979 and this Court decided *PruneYard* in 1980, this Court had not yet articulated its "public forum doctrine" as the means for determining when and how the government may regulate or exclude speech and free speech activities from public property. This Court first articulated its "public forum doctrine" in *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983) and *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985). This Court's "public forum doctrine" puts public property into one of three public forum categories and permits two significantly different standards for regulating or excluding speech and free speech activities.

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[9] *PruneYard*, *supra*, 447 U.S. at 78 and 84.

The first category is the "traditional" or "quintessential" public forum. This Court has placed public parks, sidewalks and streets in this public forum category. This category only includes public property which by long tradition has been devoted to public assembly and debate. This Court has also described a "traditional" or "quintessential" public forum as that public property which has "immemorially been held in trust for the use of the public, and, time out of mind, has been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[10]

On the public property which the government is required to hold in trust for public assembly, communication, and debate, the government's power to regulate or exclude speech and free speech activities is severely limited. Unless justified by the protection of a substantial or compelling interest, the regulation must be content-neutral. The regulation must also be narrowly drawn to protect a substantial or compelling interest. The reason for such a strict standard of regulation or exclusion is that one of the principal purposes of this property is to give the public a forum for the free exchange of ideas.

The second category includes public property the government has voluntarily opened to public assembly and general debate. When the government is not

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[10] *Perry Education Assn., supra,* at 45.

required to hold the property in trust for public assembly, etc., but voluntarily opens other public property for public assembly, etc., the government has the same severely limited power to exclude speech and free speech activities.

This Court has placed the public property which the government primarily developed, operates and maintains for other than public forum purposes in a third category – "nonpublic" forum. This Court has placed specific purpose public developments which are as generally opened to the public as any shopping center in this category – e.g., post offices and airport terminals.

Drawing an analogy to the fundamental right of private property owners to exclude entry, this Court has given the government the power to preserve the primary nonpublic forum uses to which it has dedicated public property. This Court has given the government the power to exclude incompatible uses, including incompatible speech and free speech activities. To avoid censorship, this Court has required the exclusion to be viewpoint-neutral and to be reasonably related to preserving of the government's primary uses of public property. If the government is making a reasonable, viewpoint-neutral attempt to exclude incompatible uses, the exclusion need not be content-neutral or narrowly tailored to protect a substantial or compelling government interest.

When this Court decided *PruneYard* it analyzed the PruneYard Shopping Center's takings argument

solely in terms of the economic impact of allowing opponents of a United Nations resolution against Zionism to solicit support for their opposition. *PruneYard, supra,* at 84 ("... appellants have failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state authorized limitation of it amounted to a 'taking.'"). However, this Court, since it decided *PruneYard*, has limited the government's power to dedicate public access easements.

In *Nollan, supra,* this Court held that a condition on a land use permit which required that the landowners give the general public the right to pass over a portion of their land was valid only to the extent that there was an essential nexus between the impact caused by the new development and the exaction demanded.

In *Dolan, supra,* at 374, this Court that held that a condition on a land use permit which required that the landowner dedicate land to the city for a bike path and also that portion of the land which fell within the 100 year flood plain of an adjacent river was valid only to the extent the city demonstrated (1) the dedication would mitigate the impacts caused by the development and (2) the amount of the exaction was roughly proportional to the impacts requiring the mitigation.

In *Lingle v. Chevon U.S.A. Inc.*, 544 U.S. 528, 545-548 (2005), this Court explained that *Nollan* and

Dolan had been decided on the basis that the government may not impose unconstitutional conditions on the exercise of the constitutional right to use private property, subject, of course, to reasonable regulation. *Nollan, supra*, at 833, n.2 (the ability to use private property is not a government benefit).

Taken together, *Nollan* and *Dolan's* stand for the proposition that the government may limit a private property owner's right to exclude the general public where the owner's use of its property has created an impact and the prohibition of the right to exclude can mitigate that impact. *PruneYard's* analysis, centered as it was on the economic impact of the presence of opponents of the United Nations, resolution, is no longer applicable because of its failure to consider the current state of takings jurisprudence.

This Court needs to consider the *Nollan* and *Dolan* limitations on the government's power to require the dedication of public access easements, or their functional equivalents, in light of the government's power to regulate or exclude speech and free speech activities under this Court's "public forum doctrine."

Robins identified the need for extending the state constitutional protection of speech to privately owned shopping centers as the increasing number of privately developed and maintained shopping centers and the decreasing number of publicly developed and maintained business districts incorporating what this Court has categorized as "traditional" or "quintessential"

public fora. *Robins* did not discuss the reasons for the relative increase in the number of privately owned and operated shopping centers.

As noted above, the public access requirement imposed by *Fashion Valley Mall* prevents the exclusion of speech that is incompatible with the primary function of a shopping center because the government does not have the power to exclude this message on that species of public property which this Court has identified as a "traditional public forum" or a "quintessential public forum." This analysis ignores the inescapable functional difference between a "traditional" or "quintessential" public forum and a shopping center.

One of the principle functions of the public property this Court has placed in the traditional or quintessential public forum category is to provide a place for the free exchange of ideas. In contrast, shopping centers were primarily developed for and are primarily dedicated to a nonpublic forum purpose. Even *Robins* recognized that the shopping center owners' invitation to the public is to shop at the stores in the respective shopping center, not to assemble, and publicly share information and debate public questions.[11] The dissenting opinion in *Fashion Valley Mall* observed that "[a] shopping center exists for the individual businesses on the premises to do business." The California Second District Court of Appeal described a

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[11] *Robins, supra*, at 902.

shopping center as a "center of commerce," and observed that the primary function of a shopping center is "to facilitate the ease of commerce and to promote the business of its merchant tenants."[12] A different Division of the California Second District Court of Appeal observed that the "original" and "certainly primary . . . function" of a shopping center is "as a place of commerce."[13]

Fashion Valley Mall's use of the regulatory standard applicable to public property which the government, by long tradition, is required to hold in trust for public assembly and debate ignores the economic significance of the difference between a private and public property, and ignores the rule that the Takings Clause prevents the "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[14]

When the government issues a permit for the private development of a shopping center, the private property owner bears the entire financial burden of acquiring the land, designing and constructing the shopping center, and then operating and maintaining

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[12] *H-CHH Associates v. Citizens for Representative Government*, 193 Cal.App.3d 1193, 1221 (1987).

[13] *Union of Needletrades, Indus. & Textile Employees, AFL-CIO v. Superior Court (Taubman Co.)*, 56 Cal.App.4th 996, 1017 (1997).

[14] *Lingle*, *supra*, at 537.

the shopping center development. In contrast, the government always bears the burden of operating and maintaining a public sidewalk or street, even if the government uses its permit process to require the developer to dedicate a portion of the development to a government agency for that purpose.

In addition to reducing public expenditures, permitting the private development of shopping centers generates tax revenue. Unlike public parks and sidewalks, private property generates property tax revenue. And, the amount of sales tax revenue generated by the concentration of retail businesses in an integrated shopping center development designed and operated to maximize sales makes shopping centers a proverbial "cash cow."

Applying the two-step analysis of the Takings Clause this Court articulated in *Dolan*, this Court first needs to approve or disapprove the effective dedication of a pubic access easement for free speech activities. Assuming that this Court approves the effective dedication of a public access easement for free speech activities, then this Court needs to determine whether the nature and scope of the public access easement effectively dedicated in *Fashion Valley Mall* is roughly proportional to the impact on free speech caused by the greater number of privately owned shopping centers without integrated public

parks or sidewalks.[15] That is, does the existence of a privately owned shopping center, as opposed to a publicly owned business district, create a need for the government to require public access for speech and speech activities that interfere with the shopping center's commercial functions?

Petitioner submits that loss of the power to protect the primary nonpublic function of the shopping center by excluding incompatible speech, or any incompatible activity, is a violation of the Takings Clause in the Fifth Amendment. As noted above, the Takings Clause prevents the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[16]

In conclusion, the public access easement effectively dedicated in *Fashion Valley Mall* violates the Takings Clause because it goes too far. In an effort to reverse a perceived reduction in the number of places where the public has an opportunity to publicly communicate information and debate opinions, *Robins* effectively dedicated a public access easement to "speak" on privately owned shopping centers. In *Fashion Valley Mall*, the California Supreme Court stretched the *Robins* dedicated easement to "speak" without interfering with normal business operations to an easement to "speak" with the intent to cause

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[15] *Lingle, supra*, at 546-547.

[16] *Lingle, supra*, at 537.

interference with normal business operations. While dedicating an easement to "speak" on all privately owned shopping centers will increase the number of places where the public can communicate information and debate opinions, preventing the private property owner from excluding speech calculated to cause interference with normal business operations will not. The dedication of a public access easement to "speak" with the intent to interfere with normal business operations also goes too far because it takes away from a private property owner the power this Court has given every government agency to protect the primary nonpublic forum function of public property under its control from incompatible speech and other free speech activities.

CONCLUSION

For all of the foregoing reasons, Petitioner submits that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF CALIFORNIA

FASHION VALLEY MALL, LLC, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent; GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 432-M, Real Party in Interest.	S144753 D.C. Cir.Ct.App. No. 04-1411 (Filed Dec. 24, 2007)

We granted the request of the United States Court of Appeals for the District of Columbia Circuit to decide whether, under California law, a shopping mall may enforce a rule prohibiting persons from urging customers to boycott a store in the mall. For the reasons that follow, we hold that the right to free speech granted by article I, section 2 of the California Constitution includes the right to urge customers in a shopping mall to boycott one of the stores in the mall.

FACTS

On October 15, 1998, Graphic Communications International Union Local 432-M (Union) filed a charge before the National Labor Relations Board

(NLRB) alleging that the owners of the Fashion Valley Mall (Mall) in San Diego had "refused to permit employees of the Union-Tribune Publishing Company to leaflet in front of Robinsons-May" department store in the Mall. The NLRB issued a complaint and noticed a hearing, after which an administrative law judge ruled that the Mall had violated section 8(a)(1) of the National Labor Relations Act (29 U.S.C. § 158(a)(1)) by barring the employees from distributing leaflets.[1]

The administrative law judge found that the Union "represents a unit of the pressroom employees at the San Diego Union-Tribune (Union-Tribune), a major general circulation newspaper in San Diego." The collective bargaining agreement between the employees and the newspaper had expired in 1992 and the parties had been unable to reach a new agreement. The administrative law judge thus found that a "primary labor dispute" existed between the newspaper and its employees at the time of the disputed labor activities in 1998.

On October 4, 1998, 30 to 40 Union members had distributed leaflets to customers entering and leaving

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[1] The National Labor Relations Act provides that it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of certain rights, including "the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining. . . ." (29 U.S.C. §§ 157, 158(a)(1) [barring interference with rights in § 157 (§ 7 of act)].)

the Robinsons-May store at the Mall.[2] The leaflets stated that Robinsons-May advertises in the Union-Tribune, described several ways that the newspaper allegedly treated its employees unfairly, and urged customers who believed "that employers should treat employees fairly" to call the newspaper's "CEO," listing his name and telephone number. The administrative law judge concluded: "From all indications, the leafleters conducted their activity in a courteous and peaceful manner without a disruption of any kind and without hindrance to customers entering or leaving" the store.

Within 15 or 20 minutes, Mall officials "arrived on the scene to stop the leafleting," notifying the Union members that they were trespassing because they had not obtained a permit from the Mall "to engage in expressive activity," and warning them that they "would be subject to civil litigation and/or arrest if they did not leave." A police officer appeared and, following a brief argument, the Union members moved to public property near the entrance to the Mall and continued distributing leaflets briefly before leaving the area.

The Mall has adopted rules requiring persons who desire to engage in expressive activity at the

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[2] In addition to Robinsons-May, the Fashion Valley Mall includes Nordstrom, Neiman Marcus, Saks Fifth Avenue, Macy's, and JC Penny department stores, as well as an 18-theater movie complex. The mall is surrounded by parking structures and lots.

Mall to apply for a permit five business days in advance. The applicant "must agree to abide by" the Mall's rules, including rule 5.6, which prohibits "impeding, competing or interfering with the business of one or more of the stores or merchants in the shopping center by: [¶] . . . [¶] 5.6.2 Urging, or encouraging in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the shopping center."

The administrative law judge found that the Union "was attempting to engage in a lawful consumer boycott of Robinsons-May because Robinsons-May advertised in the Union-Tribune newspaper" and further found "that it would have been utterly futile for the Union to have followed [the Mall]'s enormously burdensome application-permit process because its rules contained express provisions barring the very kind of lawful conduct the Union sought to undertake at the Mall." The administrative law judge thus ordered the Mall to cease and desist prohibiting access to the Union's "leafleters for the purpose of engaging in peaceful consumer boycott handbilling."

On September 26, 2001, the matter was transferred to the NLRB in Washington, D.C. On October 29, 2004, the NLRB issued an opinion affirming as modified the administrative law judge's decision. Citing our decision in *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, affirmed *sub nomine PruneYard Shopping Center v. Robins* (1980) 447 U.S. 74, the NLRB stated: "California law permits the

exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner rules adopted by the property owner. [Citations.] Rule 5.6.2, however, is essentially a content-based restriction and not a time, place, and manner restriction permitted under California law. That is, the rule prohibits speech 'urging or encouraging in any manner' customers to boycott one of the shopping center stores. . . . [I]t appears that the purpose and effect of this rule was to shield [the Mall]'s tenants, such as the Robinsons-May department store, from otherwise lawful consumer boycott handbilling. Accordingly, we find that [the Mall] violated Section 8(a)(1) by maintaining Rule 5.6.2. [Citation.]" (Fn. omitted.)

The Mall petitioned for review before the United States Court of Appeals for the District of Columbia Circuit, which issued an opinion on June 16, 2006. The court of appeals stated it had to resolve two issues: "(1) State law aside, did [the Mall]'s requirement of a permit for expressive activity, conditioned as it was upon the Union's agreement not to urge a boycott of any Mall tenant, violate § 8(a)(1) of the Act? (2) If so, was [the Mall] acting within its rights under California law?" The court answered the first question in the affirmative, which meant that the case turned on the resolution of the second question. The court addressed this question of California law as follows: "Although [the Mall] is correct that there is not substantial evidence the Union intended to boycott any of the Mall's tenants, nothing in the Act prohibits the Union from carrying out a secondary

boycott[3] by means of peaceful handbilling. [citation.] in subjecting the Union to a permit process that required it to forswear use of this lawful tactic, therefore, [the Mall] interfered with the employees' rights under § 7 of the Act. . . . Enforcement of Rule 5.6.2 therefore violated § 8(a)(1) – unless, that is, the Company had the right under California constitutional law to exclude the employees altogether." The court of appeals observed that "no California court has squarely decided whether a shopping center may lawfully ban from its premises speech urging the public to boycott a tenant," and concluded that "whether [the Mall] violated § 8(a)(1) of the Act depends upon whether it could lawfully maintain and enforce an anti-boycott rule – a question no California court has resolved." Accordingly, the United States Court of Appeals for the District of Columbia Circuit filed in this court a request,[4] which we granted, to decide the following question: "Under California law may Fashion Valley maintain and enforce against the Union its Rule 5.6.2?"

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[3] A "secondary boycott" is "union activity directed against a neutral employer." (*NLRB v. Pipefitters* (1977) 429 U.S. 507, 534.)

[4] Rule 8.548(a) of the California Rules of Court, which replaced former rule 29.8(a), states: "On request of the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth, the Supreme Court may decide a question of California law if: [¶] (1) The decision could determine the outcome of a matter pending in the requesting court; and [¶] (2) There is no controlling precedent."

Discussion

Article I, section 2, subdivision (a) of the California Constitution declares: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Nearly 30 years ago, in *Robins v. Pruneyard Shopping Center, supra,* 23 Cal.3d 899, 910 (*Pruneyard*), we held that this provision of our state Constitution grants broader rights to free expression than does the First Amendment to the United States Constitution by holding that a shopping mall is a public forum in which persons may exercise their right to free speech under the California Constitution. We stated that a shopping center "to which the public is invited can provide an essential and invaluable forum for exercising [free speech] rights." (*Ibid.*) We noted that in many cities the public areas of the shopping mall are replacing the streets and sidewalks of the central business district which, "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." (*Hague v. C.I.O* (1939) 307 U.S. 496, 515.) Because of the "growing importance of the shopping center[,] . . . to prohibit expressive activity in the centers would impinge on constitutional rights beyond speech rights," particularly the right to petition for redress of grievances. (*Pruneyard, supra,* 23 Cal.3d at p. 907.) Accordingly, we held that the California Constitution "protect[s]

speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." (*Id.* at p. 910.) We added the caveat in *Pruneyard* that "[b]y no means do we imply that those who wish to disseminate ideas have free rein," noting our previous "endorsement of time, place, and manner rules." (*Ibid.*)

The Mall in the present case generally allows expressive activity, as mandated by the California Constitution, but requires persons wishing to engage in free speech in the Mall to obtain a permit. Under rule 5.6.2, the Mall will not issue a permit to engage in expressive activity unless the applicant promises to refrain from conduct "Urging, or encouraging in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the shopping center." We must determine, therefore, whether a shopping center violates California law by banning from its premises speech urging the public to boycott one or more of the shopping center's businesses.

The idea that private property can constitute a public forum for free speech if it is open to the public in a manner similar to that of public streets and sidewalks long predates our decision in *Pruneyard*. The United States Supreme Court recognized more than half a century ago that the right to free speech guaranteed by the First Amendment to the United States Constitution can apply even on privately owned land. In *Marsh v. Alabama* (1946) 326 U.S. 501, 502, the high court held that a Jehovah's Witness had the

right to distribute religious literature on the sidewalk near the post office of a town owned by the Gulf Shipbuilding Corporation, because the town had "all the characteristics of any other American town. . . . In short, the town and its shopping district are accessible to and freely used by the public in general, and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." (*Id.* at pp. 502-503.) The high court stated: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." (*Id.* at p. 506.)

This court followed the high court's decision in *Marsh* to hold that a shopping center could not prohibit a union's peaceful picketing of one of the shopping center's stores. (*Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union* (1964) 61 Cal.2d 766 (*Schwartz-Torrance*).) We recognized that peaceful picketing by a labor union "involves an exercise of the constitutionally protected right of freedom of speech." (*Id.* at p. 769.) We rejected the shopping center's argument that its right to "the exclusive possession and enjoyment of private property" outweighed the union's right to picket: "Because of the public character of the shopping center, however, the impairment of plaintiff's interest must be largely theoretical. Plaintiff has fully opened his property to the public." (*Id.* at p. 771.)

In *In re Hoffman* (1967) 67 Cal.2d 845, we reiterated that private property that was open to the public in the same manner as public streets or parks could constitute a public forum for free expression, holding that protesters had the right to express their opposition to the war in Vietnam by distributing leaflets in Union Station in Los Angeles, "a spacious area open to the community as a center for rail transportation" that was owned by three railroad companies. (*Id.* at p. 847.) This court reasoned that, with regard to distributing leaflets, "a railway station is like a public street or park. Noise and commotion are characteristic of the normal operation of a railway station. The railroads seek neither privacy within nor exclusive possession of their station. They therefore cannot invoke the law of trespass against petitioners to protect those interests. [¶] Nor was there any other interest that would justify prohibiting petitioners' activities. Those activities in no way interfered with the use of the station. They did not impede the movement of passengers or trains, distract or interfere with the railroad employees' conduct of their business, block access to ticket windows, transportation facilities or other business legitimately on the premises. Petitioners were not noisy, they created no disturbance, and did not harass patrons who did not wish to hear what they had to say. [¶] Had petitioners in any way interfered with the conduct of the railroad business, they could legitimately have been asked to leave." (*Id.* at pp. 851-852, fn. omitted.)

In *In re Lane* (1969) 71 Cal.2d 872, we applied our earlier holding in *Schwartz-Torrance* to conclude that a union had a right to distribute handbills on a privately owned sidewalk outside a business. We held that the sidewalk "is not private in the sense of not being open to the public. The public is openly invited to use it in gaining access to the store and in leaving the premises." (*Id.* at p. 878.) We held, therefore, that the privately owned sidewalk was "a public area in which members of the public may exercise First Amendment rights," including peacefully distributing handbills: "[W]hen a business establishment invites the public generally to patronize its store and in doing so to traverse a sidewalk opened for access by the public the fact of private ownership of the sidewalk does not operate to strip the members of the public of their rights to exercise First Amendment privileges on the sidewalk at or near the place of entry to the establishment. In utilizing the sidewalk for such purposes those seeking to exercise such rights may not do so in a manner to obstruct or unreasonably interfere with free ingress or egress to or from the premises." (*Ibid.*)

During the interim between our decisions in *Schwartz-Torrance* and *Lane*, the United States Supreme Court adopted a similar position, holding in *Food Employees v. Logan Plaza* (1968) 391 U.S. 308 (disapproved in *Hudgens v. NLRB* (1976) 424 U.S. 507, 518) that peaceful picketing by union members of a business in a shopping center that employed nonunion workers was protected by the

First Amendment. The high court observed that that the shopping center in *Logan Plaza* "is clearly the functional equivalent of the business district" in *Marsh.* (*Food Employees v. Logan Plaza, supra,* 391 U.S. at p. 318.) The high court emphasized the importance of recognizing a union's right to peacefully picket in a shopping center: "Business enterprises located in downtown areas would be subject to on-the-spot public criticism for their practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism by creating a *cordon sanitaire* of parking lots around their stores. Neither precedent nor policy compels a result so at variance with the goal of free expression and communication that is the heart of the First Amendment." (*Id.* at pp. 324-325.)

In *Diamond v. Bland* (1970) 3 Cal.3d 653 (*Diamond I*), we went one step further than the decision in *Logan Plaza. Logan Plaza* held that a shopping center could not prohibit a union from peacefully picketing one of the stores in the center, but the issue in *Diamond I* was whether a privately owned shopping center could prohibit free speech activity that was *unrelated* to the business of the center. In *Diamond I,* a large privately owned shopping center refused to allow a group called the People's Lobby to solicit signatures on two antipollution initiative petitions. We noted that the United States Supreme Court had held in *Logan Plaza* that "a shopping center could not absolutely prohibit union picketing of a business located within the Center," but had

"expressly declined to decide whether 'respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put.' [Citation.]" (*Id.* at p. 661.) We observed that, prior to the decision in *Logan Plaza,* we had "reached an identical result" in *Schwartz-Torrance,* holding that a shopping center could not prohibit peaceful union picketing of a business in the center and, in *Lane,* had extended that holding to apply to a privately owned sidewalk in front of a business. (*Ibid.*) We concluded that it was settled that a shopping center could not prohibit free speech activity, such as union picketing, that was related to the business of the shopping center: "This series of cases involving union picketing in shopping centers establishes constitutional protection for picketing and other First Amendment activities which are related in their purpose to the normal use to which the shopping center property is devoted." (*Ibid.*)

The issue presented in *Diamond I* was whether a privately owned shopping center could prohibit free speech activity that was *unrelated* to the business of the shopping center. We acknowledged that it was relevant that in both *Schwartz-Torrance* and *Logan Plaza* "the unions involved were picketing businesses located within the shopping centers," because that fact "strengthened the interest of the petitioners in their exercise of the First Amendment activities inside the shopping centers." (*Diamond I, supra,* 3

Cal.3d 653, 662.) We explained: "When the activity to be protected is the right to picket an employer, the location of the employer's business is often the only effective locus; alternative locations do not call attention to the problem which is the subject of the picketing and may fail to apply the desired economic pressure." (*Ibid.*) But even though the interest in conducting free speech activity that is unrelated to the business of the shopping center is significantly less than the interest of a union to picket a business, it remained sufficiently substantial to outweigh the owner's interest in prohibiting such activity: "Therefore, although there is arguable merit to defendants' position that plaintiffs' interest in the exercise of their First Amendment rights at the Center may be less compelling than the First Amendment interests involved in *Schwartz-Torrance, Logan Plaza*, and *Lane,* their contention does not justify striking the balance in favor of defendants' property rights. As we have explained, plaintiffs' interest is of significant constitutional dimension, while defendants' concern is no stronger than the interests of the property owners in *Schwartz-Torrance, Logan*, and *Lane*." (*Id.* at p. 663.) Thus, a privately owned shopping center must permit not only peaceful picketing of businesses in the center, but further must permit free speech activity that is unrelated to the business of the shopping center.

Two years later, the United States Supreme Court in *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551, took a different course and disagreed with our decision in

Diamond I, holding to the contrary that a privately owned shopping center could prohibit First Amendment activity that was unrelated to the business of the center.

In light of the high court's decision in *Lloyd,* we reconsidered our decision in *Diamond I* and, in *Diamond v. Bland* (1974) 11 Cal.3d 331, 332 (*Diamond II*), held that a privately owned shopping center could prohibit free speech activity that was unrelated to the operation of the shopping center. Justice Mosk, joined by Justice Tobriner and, in part, by Justice Sullivan, filed a lengthy and impassioned dissent, urging the court to adhere to its decision in *Diamond I* on the basis of the California Constitution. He wrote: "For a number of years cases in this state even prior to the federal decision in [*Logan Plaza*] have held that union members enjoy the right to picket an employer on the property of a privately owned shopping center. These decisions emphasized that an employee who sought to bring his grievance to the attention of the public and apply economic sanctions against his employer could effectively do so only at the place where the business was located, and that any incidental impairment of the shopping center owner's property rights was largely theoretical since he had opened his premises to the public and his right in the property was 'worn thin by public usage.' [Citations.] . . . [¶] The *Diamond* [*I*] opinion recognized that although *Schwartz-Torrance* and *Lane* were factually distinguishable in some respects, the distinction did not justify striking a new balance to limit plaintiff's

freedom of expression." (*Diamond II, supra,* 11 Cal.3d 331, 341 (dis. opn. of Mosk, J.).)

The United States Supreme Court then abandoned its holding in *Logan Plaza* that a shopping center could not prohibit a union from peacefully picketing one of the stores in the center by holding in *Hudgens v. NLRB* (1976) 424 U.S. 507, 518, that "the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan* [*Plaza*]." The United States Supreme Court thus held that the First Amendment did not guarantee the right to free speech in a shopping mall. This court, however, did not follow the lead of the high court. Rather, we heeded the wisdom of Justice Mosk's dissent in *Diamond II* and held in *Pruneyard* that the California Constitution granted a right to free speech in a privately owned shopping center. (*Pruneyard, supra,* 23 Cal.3d 899, 902.)

Our decision that the California Constitution protects the right to free speech in a shopping mall, even though the federal Constitution does not, stems from the differences between the First Amendment to the federal Constitution and article I, section 2 of the California Constitution. We observed in *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 486, that the free speech clause in article I of the California Constitution differs from its counterpart in the federal Constitution both in its language and its scope. "It is beyond peradventure that article I's free speech clause enjoys existence and force independent of the First Amendment's. In section 24, article I

states, in these very terms, that '[r]ights guaranteed by [the California] Constitution are not dependent on those guaranteed by the United States Constitution.' This statement extends to all such rights, including article I's right to freedom of speech. For the California Constitution is now, and has always been, a 'document of independent force and effect particularly in the area of individual liberties.' [Citations.]" (*Gerawan Farming, Inc. v. Lyons, supra,* 24 Cal.4th at pp. 489-490.) "As a general rule, . . . article I's free speech clause and its right to freedom of speech are not only as broad and as great as the First Amendment's, they are even 'broader' and 'greater.' [Citations.]" (*Gerawan Farming, Inc. v. Lyons, supra,* 24 Cal.4th 468, 491.)

In *Pruneyard, supra,* 23 Cal.3d 899, 902, high school students in the mall were prohibited from soliciting support for their opposition to a United Nations resolution against Zionism. We held that the mall could not prohibit the students' efforts despite the fact that this free speech activity was unrelated to the business of the center. (*Ibid.*) In so holding, we relied upon our earlier decision in *Schwartz-Torrance,* which, we noted, "held that a labor union has the right to picket a bakery located in a shopping center." (*Id.* at p. 909.) We cautioned, however, that we did not "imply that those who wish to disseminate ideas have free rein," noting our previous "endorsement of time, place, and manner rules." (*Id.* at p. 910.) We also repeated Justice Mosk's observation in his dissent in *Diamond II* that compelling a shopping center to

permit "'[a] handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations [citation] would not markedly dilute defendant's property rights.' [Citation.]" (*Id.* at p. 911, quoting *Diamond II, supra,* 11 Cal.3d 331, 345, dis. opn. of Mosk, J.)[5]

The Mall argues that its rule banning speech that advocates a boycott is a "reasonable regulation" designed to assure that free expression activities "do not interfere with normal business operations" within the meaning of our decision in *Pruneyard.*

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[5] The shopping center in *Pruneyard* appealed our decision to the United States Supreme Court, arguing that it violated the shopping center's constitutional right to control the use of its private property. (*PruneYard Shopping Center v. Robins, supra,* 447 U.S. 74, 79.) The high court disagreed, noting that its decision in *Lloyd* did not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." (*Id.* at p. 81.) The court rejected the argument that compelling the shopping mall to permit expressive activity amounted to a taking of its private property, observing that it would not "unreasonably impair the value or use of their property as a shopping center. The PruneYard is a large commercial complex that covers several city blocks, contains numerous separate business establishments, and is open to the public at large. The decision of the California Supreme Court makes it clear that the PruneYard may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions." (*Id.* at p. 83.)

(*Pruneyard, supra,* 23 Cal.3d 899, 911.) According to the Mall, it "has the right to prohibit speech that interferes with the intended purpose of the Mall," which is to promote "the sale of merchandise and services to the shopping public." We disagree.

It has been the law since we decided *Schwartz-Torrance* in 1964, and remains the law, that a privately owned shopping center must permit peaceful picketing of businesses in shopping centers, even though such picketing may harm the shopping center's business interests.[6] Our decision in *Diamond I* recognized that citizens have a strengthened interest, not a diminished interest, in speech that presents a grievance against a particular business in a privately owned shopping center, including speech that advocates a boycott.

In so holding in *Diamond I,* we added the caveats to which Justice Mosk referred in his dissent in

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[6] The Mall argues that we cannot rely upon the decisions in *Schwartz-Torrance, supra,* 61 Cal.2d 766, and *In re Lane, supra,* 71 Cal.2d 872, because they were based upon the First Amendment, but we have held that the "fact that those opinions cited federal law that subsequently took a divergent course does not diminish their usefulness as precedent." (*Pruneyard, supra,* 23 Cal.3d 899, 908.) As the plurality in *Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013 later observed: "Although all of these cases relied on the First Amendment and the pre-*Lloyd* decisions of the United States Supreme Court . . . *Robins* [*v. Pruneyard Shopping Center*] found many of the principles enunciated in these cases persuasive in interpreting California's free speech clause. [Citation.]" (*Id.* at p. 1032 (plur. opn. of Brown, J.), fn. omitted.)

Diamond II (11 Cal.3d 331, 345), which we discussed in *Pruneyard* (23 Cal.3d 899, 911) and upon which the Mall in the present case relies: that a shopping center may prohibit conduct "calculated to disrupt normal business operations" or that would result in "obstruction of or undue interference with normal business operations." (*Diamond I, supra,* 3 Cal.3d 653, 665-666.) But this does not mean that shopping centers can prohibit speech that advocates a boycott. In adding these caveats recognizing a shopping center's right to impose reasonable regulations upon expressive activity, we used as examples our decisions in *Schwartz-Torrance* and *Lane,* both of which recognized the right of a union to picket a business and advocate a boycott. We expressly noted that we were approving regulations that would impose "reasonable limitation[s] as to time, place, or manner." (*Diamond I,* at p. 665.)[7] In light of the fact that we expressly relied upon, and extended, our decisions in

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[7] We provided examples of such regulations: "Moreover, the trial court findings in the instant action demonstrate the ability of Inland Center to regulate the various sales promotions and displays that are permitted in the common aisleways: 'In every instance where a promotion is held, it is closely regulated as to time, date, location, number of people or exhibits involved, manner of presentation and security factors.' Similar regulations, if not repressive in scope, can be devised to protect Inland Center from actual or potential danger of First Amendment activities being conducted on its premises in a manner calculated to disrupt normal business operations and to interfere with the convenience of customers." (*Diamond I, supra,* 3 Cal.3d 653, 665.)

Schwartz-Torrance and *Lane,* which approved union activity advocating a boycott, it would make no sense to interpret this language in *Diamond I* (and its subsequent references in the dissent in *Diamond II* and the decision in *Pruneyard*) to suggest that shopping centers may prohibit speech that advocates a boycott.[8]

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[8] The United States Supreme Court recognized that, under the First Amendment, speech that does no more than attempt to peacefully persuade customers not to patronize a business cannot be banned on the ground that it interferes with normal business operations. The high court held that the fact that customers might be persuaded not to patronize a business did not justify restricting speech advocating a boycott: "It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. *But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. . . .* We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion. . . ." (*Thornhill v. Alabama* (1940) 310 U.S. 88, 104-105, italics added, fn. omitted.)

This important distinction between urging customers to boycott a business and physically impeding access to that business was recognized in *People v. Poe* (1965) 236 Cal.App.2d Supp. 928, which affirmed convictions for trespass of protesters who blocked the entrance to a bank, while recognizing the right of the protesters to peacefully picket, observing that the protesters "may call the bank to task for its wrongs, real or not, but

(Continued on following page)

The level of scrutiny with which we review a restriction of free speech activity depends upon whether it is a content-neutral regulation of the time, place, or manner of speech or restricts speech based upon its content. A content-neutral regulation of the time, place, or manner of speech is subjected to intermediate scrutiny to determine if it is "(i) narrowly tailored, (ii) serves a significant government interest, and (iii) leaves open ample alternative avenues of communication. [Citation.]" (*Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 364 (*Alliance*).) A content-based restriction is subjected to strict scrutiny. "[D]ecisions applying the liberty of speech clause [of the California Constitution], like those applying the First Amendment, long have recognized that in order to qualify for intermediate scrutiny (i.e., time, place, and manner) review, a regulation must be 'content neutral' [citation], and that if a regulation is content based, it is subject to the more stringent strict scrutiny standard. [Citation.]" (*Id.* at pp. 364-365, fn. omitted.)[9]

Prohibiting speech that advocates a boycott is not a time, place, or manner restriction because it is not

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they may not themselves interfere with anything but the minds of their audience." (*Id.* at p. Supp. 937.)

[9] "Clearly, government has no power to restrict [expressive] activity because of its message. Our cases make equally clear, however, that reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 115, fns. omitted.)

content neutral. The Malls' rule prohibiting persons from urging a boycott is improper because it does not regulate the time, place, or manner of speech, but rather bans speech urging a boycott because of its content. Restrictions upon speech "'that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.' [Citation.]" (*DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 877.)

The Mall argues that its rule prohibiting speech that urges a boycott is "a 'content-neutral' restriction under California law because it applies to any and all requests for a consumer boycott of the Mall's merchants . . . regardless of the subject matter or viewpoint of the speaker advocating the boycott. . . ." The Mall is mistaken. The Mall's rule prohibiting all boycotts may be *viewpoint neutral,* because it treats all requests for a boycott the same way,[10] but it is not *content neutral,* because it prohibits speech that urges a boycott while permitting speech that does not.

In *Boos v. Barry* (1987) 485 U.S. 312, 315, the high court considered a provision that prohibited "the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.'" This provision was content based, because whether a sign was permitted depended upon whether it was "critical

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[10] The parties dispute whether the rule is viewpoint neutral. We express no view on this question.

of the foreign government or not. One category of speech has been completely prohibited. . . ." (*Id.* at pp. 318-319.)[11] The high court rejected the argument that the provision was content neutral because the government did not select between viewpoints, but rather prohibited all signs adverse to a foreign government's policies: "While this prevents the display clause from being directly viewpoint-based, . . . it does not render the statute content-neutral. . . . [A] regulation that 'does not favor either side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic.' [Citation.] Here the government has determined that an entire category of speech – signs or displays critical of foreign governments – is not to be permitted." (*Id.* at p. 319.) We find this reasoning persuasive; the Mall has prohibited an entire category of speech – speech that advocates a boycott. Thus, the Mall's rule is content based and must be given strict scrutiny. (*Alliance, supra,* 22 Cal.4th 352, 365; *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory* (1984) 154 Cal.App.3d 1157, 1170.)

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[11] This portion of Justice O'Connor's opinion was joined by only two other justices: Justices Stevens and Scalia. But Justice Brennan made clear in his concurring opinion, which was joined by Justice Marshall, that he agreed the provision was content based and wrote separately to distance himself from other language discussing the secondary effects of the speech. (*Boos v. Barry, supra,* 485 U.S. 312, 334 (conc. opn. of Brennan, J.).)

The Mall asserts that our decision in *Alliance, supra,* 22 Cal.4th 352, supports its position that its rule is not content based, but the Mall's reliance is misplaced. In that case, we held that "an ordinance . . . that is directed at activity involving public solicitation for the immediate donation or payment of funds should not be considered content based . . . and should be evaluated under the intermediate scrutiny standard applicable to time, place, and manner regulations, rather than under the strict scrutiny standard." (*Id.* at p. 357.) The ordinance at issue in *Alliance* made it unlawful to solicit or beg "'with the purpose of obtaining an immediate donation of money or other thing of value'" in certain areas, such as near a bank or automated teller machine, or in any public place if the solicitation was done in an "'aggressive manner.'" (*Id.* at p. 363, italics omitted.)

The Mall argues that "boycotts can be prohibited for the same reason that the solicitation of funds can be prohibited," but this argument does not withstand analysis. In holding that the ordinance in *Alliance* banning solicitation for immediate donation or exchange of funds was content neutral, we explained that the United States Supreme Court used the rule "that a restriction is content neutral if it is 'justified without reference to the content of the regulated speech.' [Citations.]" (*Alliance, supra,* 22 Cal.4th 352, 367.) This rule does "*not* require literal or absolute content neutrality, but instead require[s] only that the regulation be 'justified' by legitimate concerns that are unrelated to any 'disagreement with the

message' conveyed by the speech. [Citation.]" (*Id.* at p. 368.) We then focused on the manner in which a face-to-face solicitation asking for an immediate donation is conducted. By its very nature, this type of solicitation "may create distinct problems and risks that warrant different treatment and regulation" than other forms of speech-related activity. (*Id.* at p. 357.) Such a solicitation was "'disruptive of business'" because it "'impedes the normal flow of traffic.'" (*Id.* at p. 369, quoting *United States v. Kokinda* (1990) 497 U.S. 720, 733-734.) Additionally, "'[i]n-person solicitation of funds, when combined with immediate receipt of that money, creates a risk of fraud and duress.'" (*Alliance*, at p. 371, quoting *International Soc. for Krishna Consciousness, Inc. v. Lee* (1992) 505 U.S. 672, 705 (conc. opn. of Kennedy, J.).) The ordinance in *Alliance* was directed at the conduct and intrusiveness that face-to-face solicitation for immediate donation or exchange of funds inherently promotes. We therefore found the ban on certain solicitations to be content neutral because it was justified by legitimate concerns that were unrelated to content.

The rule at issue here prohibiting speech that advocates a boycott cannot similarly be justified by legitimate concerns that are unrelated to content. Peacefully urging a boycott in a mall does not by its nature cause congestion, nor does it promote fraud or duress. "[T]he boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments." (*NAACP v.*

Claiborne Hardware Co. (1982) 458 U.S. 886, 907, fn. omitted.) Our California Constitution provides greater, not lesser, protection for this traditional form of free speech. (See *Gerawan Farming, Inc. v. Lyons, supra,* 24 Cal.4th 468, 491.) Unlike the ordinance in *Alliance,* the Mall's rule in the instant case is not concerned with the inherently intrusive nature of such speech, but rather with the impact such speech may have on its listeners. "Handbills . . . 'depend entirely on the persuasive force of the idea.' [Citation.]" (*DeBartolo Corp. v. Fla. Gulf Coast Trades Council* (1988) 485 U.S. 568, 580.) "The loss of customers because they read a handbill urging them not to patronize a business . . . is the result of mere persuasion. . . ." (*Ibid.*) The Mall is concerned that the speech may be effective and persuade customers not to patronize a store. But "[l]isteners' reaction to speech is not a content-neutral basis for regulation." (*Forsyth County v. Nationalist Movement* (1992) 505 U.S. 123, 134 [basing the amount of a permit fee on the degree of hostility the message would create is a content-based regulation of speech].) The Mall seeks to prohibit speech advocating a boycott solely because it disagrees with the message of such speech, which might persuade some potential customers not to patronize the stores in the Mall.

The Mall relies heavily on a Court of Appeal decision that also involved a solicitation of funds and predates our decision in *Alliance. H-CHH Associates v. Citizens for Representative Government* (1987) 193 Cal.App.3d 1193, 1203 (H-CHH), held that a shopping

mall properly could prohibit the solicitation of "'contributions or donations from anyone on center property.'" Citing as authority only a decision of the Third Circuit Court of Appeals (*Intern. Soc. for Krishna v. New Jersey Sports, etc.* (3d Cir.1982) 691 F.2d 155), the Court of Appeal in *H-CHH* concluded that "the solicitation of political funds is entirely incompatible with the normal character and function of the Plaza. The Plaza exists as a center of commerce. . . . Any activity seeking to solicit political contributions necessarily interferes with that function by competing with the merchant tenants for the funds of Plaza patrons." (*H-CHH, supra,* 193 Cal.App.3d at p. 1221.)

Although as noted above, solicitations for immediate donations may be restricted based upon "the inherently intrusive and potentially coercive nature of that *kind* of speech" (*Alliance, supra,* 22 Cal.4th 352, 373), the decision in *H-CHH* was incorrect that solicitations of funds may be prohibited simply because they compete with the shopping center's merchants. Relying upon the fact that a solicitation of funds competes with the shopping center merchants, as did the court in *H-CHH* and as does the Mall in this case, would lead to the conclusion that all solicitations of funds may be prohibited, even those that are not inherently intrusive or potentially coercive. Such a restriction would be too broad.[12]

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[12] We disapprove the decision in *H-CHH Associates v. Citizens for Representative Government, supra,* 193 Cal.App.3d 1193, to the extent it states a contrary view.

We conclude, therefore, that the Mall's rule prohibiting all speech that advocates a boycott is content based and thus is subject to strict scrutiny. (*Alliance, supra,* 22 Cal.4th 352, 365.) Strict scrutiny for purposes of the federal Constitution means that a content-based speech restriction must be "necessary to serve a compelling state interest, and . . . narrowly drawn to achieve that end." (*Arkansas Writers' Project, Inc. v. Ragland* (1987) 481 U.S. 221, 231.) The right to free speech in shopping centers that constitute public fora under the California Constitution deserves no less protection. In order to ensure that regulations of speech are not "based on hostility – or favoritism – towards the underlying message expressed'" (*Turner Broadcasting System, Inc. v. FCC* (1994) 512 U.S. 622, 642), a content-based rule limiting expression in a shopping center that constitutes a public forum must be necessary to serve a compelling interest and be narrowly drawn to achieve that end.

The Mall's rule prohibiting speech that advocates a boycott cannot withstand strict scrutiny. The Mall's purpose to maximize the profits of its merchants is not compelling compared to the Union's right to free expression. Urging customers to boycott a store lies at the core of the right to free speech. (*NAACP v. Claiborne Hardware Co., supra,* 458 U.S. 886, 911 ["boycott clearly involved constitutionally protected activity"].) "The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is

essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth." (*Thornhill v. Alabama, supra,* 310 U.S. 88, 95.) The fact that speech may be convincing is not a proper basis for prohibiting it. The right to free speech "extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts. [Citations.]" (*Thomas v. Collins* (1945) 323 U.S. 516, 537.) The Mall cites no authority, and we are aware of none, that holds that a store has a compelling interest in prohibiting this traditional form of free speech.

A shopping mall is a public forum in which persons may reasonably exercise their right to free speech guaranteed by article I, section 2 of the California Constitution. Shopping malls may enact and enforce reasonable regulations of the time, place and manner of such free expression to assure that these activities do not interfere with the normal business operations of the mall, but they may not prohibit certain types of speech based upon its content, such as prohibiting speech that urges a boycott of one or more of the stores in the mall.

CONCLUSION

We hold that, under California law, Fashion Valley Mall may not maintain and enforce against the Union its rule 5.6.2, which prohibits "[u]rging, or encouraging in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the shopping center."

MORENO, J.

WE CONCUR: GEORGE, C.J.
KENNARD, J.
WERDEGAR, J.

COPY

FASHION VALLEY MALL, LLC v. NATIONAL LABOR RELATIONS BOARD

S144753

DISSENTING OPINION BY CHIN, J.

I dissent.

By a bare four-to-three majority, *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899 (*Pruneyard*)[1] overruled a decision then only five years

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[1] Courts have not been consistent in giving this case a shorthand name. For example, the plurality, concurring, and dissenting opinions in *Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013 (*Golden Gateway*)

(Continued on following page)

old and held that public free speech rights exist on private property under the California Constitution. *Pruneyard* was wrong when decided. In the nearly three decades that have since elapsed, jurisdictions throughout the nation have overwhelmingly rejected it. We should no longer ignore this tide of history. The time has come for us to forthrightly overrule *Pruneyard* and rejoin the rest of the nation in this important area of the law. Private property should be treated as private property, not as a public free speech zone.

Even if we do not overrule *Pruneyard, supra,* 23 Cal.3d 899, we should at least not carry it to the extreme that the majority does. *Pruneyard* is easily distinguished. The free speech activity that *Pruneyard* sanctioned was compatible with normal use of the property. The opposite is true here. Fashion Valley Mall is a privately owned shopping center. A shopping center exists for the individual businesses on the premises to do business. Urging a boycott of those businesses contradicts the very purpose of the shopping center's existence. It is wrong to compel a private property owner to allow an activity that contravenes the property's purpose.

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called it *Robins* for short. But because the majority here calls it *Pruneyard*, I will do so also.

I. THE FACTS

Fashion Valley Mall, LLC (Fashion Valley), owns a large shopping mall in San Diego (the mall). Fashion Valley permits expressive activities inside the mall by those who apply for a permit and agree to abide by its regulations. An applicant for a permit must state the purpose of the proposed expressive activity, submit a copy or a description of any materials and signs to be used, list the participants, provide a $50 refundable cleaning deposit, and purchase insurance as necessary. Additionally, pursuant to Fashion Valley's rule 5.6.2 (rule 5.6.2), the applicant must agree to abstain from "Urging, or encouraging in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the shopping center."

In October 1998, approximately 30 members and supporters of the Graphic Communications International Union (Union) gathered outside the Robinsons-May department store at the mall to protest actions taken by The San Diego Union-Tribune newspaper. The Union decided to stage the protest there because the store advertises in the newspaper and is located not far from the newspaper's premises. The protestors distributed a handbill addressed, "Dear customer of Robinsons-May," that outlined the Union's grievances against the newspaper. The handbill made clear "[t]o the employees of Robinsons-May . . . [the] dispute is with The San Diego Union-Tribune. We are not asking you to cease working for your employer." The Union encouraged patrons and employees to call the

newspaper's chief executive officer. The handbill stated that "Robinsons-May advertises with the Union-Tribune." After about 15 minutes, a representative of Fashion Valley approached the protestors, explained that a permit was required for expressive activity, and told them to leave the premises, which they did.

Later, instead of applying for a permit, the Union filed a charge with the National Labor Relations Board (Board) alleging that Fashion Valley had violated section 8(a)(1) of the National Labor Relations Act (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the act. That section guarantees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (29 U.S.C. § 157.) An administrative law judge, and later the Board, held that Fashion Valley did violate section 8(a)(1). The Board ordered Fashion Valley to rescind rule 5.6.2.

Fashion Valley petitioned the District of Columbia Circuit to review the Board's decision. The court "h[e]ld that whether Fashion Valley violated the [National Labor Relations Act] depends upon whether it had the right, under California law, to maintain and enforce its anti-boycott rule." (*Fashion Valley Mall, LLC. v. N.L.R.B.* (D.C. Cir. 2006) 451 F.3d 241,

242 (*Fashion Valley*).) Pursuant to California Rules of Court, former rule 29.8 (now rule 8.548), it requested us to answer the following question: "Under California law may Fashion Valley maintain and enforce against the Union its Rule 5.6.2?" (*Fashion Valley, supra,* at p. 246.) We granted the request. Later, we permitted the Union to intervene in the action. (Code Civ. Proc., § 387, subd. (a).)

II. Discussion

The issue here is straightforward: Does the California Constitution compel the owner of a private shopping center to allow persons on its property to urge potential customers to boycott businesses within the center? Saying yes, the majority relies primarily on *Pruneyard, supra,* 23 Cal.3d 899. To place this issue in perspective, I first provide a historical review. Then I will explain why we should overrule *Pruneyard.* Finally, I will show that *Pruneyard,* even if still considered the law in California, is entirely distinguishable.

A. Historical Review

At one time, both this court and the United States Supreme Court held that, in some situations, constitutional free speech rights existed on private property. (E.g., *Food Employees v. Logan Plaza* (1968) 391 U.S. 308 (*Logan*) [private shopping center]; *Marsh v. Alabama* (1946) 326 U.S. 501 (*Marsh*) [company town]; *Diamond v. Bland* (1970) 3 Cal.3d

653 (*Diamond I*) [private shopping center]; *In re Lane* (1969) 71 Cal.2d 872 (*Lane*) [stand-alone grocery store]; *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union* (1964) 61 Cal.2d 766 (*Schwartz-Torrance*) [private shopping center].) Because both the United States and the California Constitutions seemed to be the same in this regard, this court did not clearly establish which Constitution it relied on in finding free speech rights. We treated the two Constitutions as essentially interchangeable. For example, our opinion in *Schwartz-Torrance, supra,* at pages 771-773, relied in part on *Marsh,* as well as cases from other states, and our opinions in *Lane, supra,* at pages 874-877, and *Diamond I, supra,* at pages 658-660, relied heavily on *Marsh* and *Logan.* As of 1970, our jurisprudence was consistent with high court jurisprudence in this area.

All this changed in the decade of the 1970's regarding private shopping centers. In two decisions, the United States Supreme Court reversed *Logan, supra,* 391 U.S. 308, and held that no free speech rights exist in private shopping centers under the United States Constitution. (*Hudgens v. NLRB* (1976) 424 U.S. 507 (*Hudgens*); *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551 (*Lloyd Corp.*).) As we recently explained, the *Hudgens* court "held that a union had no federal constitutional right to picket in a shopping center because the actions of the private owner of the shopping center did not constitute state action." (*Golden Gateway, supra,* 26 Cal.4th at p. 1019 (plur. opn.).)

The question whether the new high court decisions affected California law arose promptly. Even before the second of these decisions, we reconsidered our decision in *Diamond I, supra,* 3 Cal.3d 653, in a second case of the same name. In *Diamond v. Bland* (1974) 11 Cal.3d 331 (*Diamond II*), we followed the high court and held that "defendants' private property interests outweigh plaintiffs' own interests in exercising First Amendment rights in the manner sought herein." (*Id.* at p. 335.) We noted that "[o]ur prior holding in [*Diamond I*] was based primarily upon our interpretation of the rationale of two cases of the United States Supreme court, namely, *Marsh v. Alabama,* 326 U.S. 501, and *Food Employees v. Logan Plaza,* 391 U.S. 308." (*Id.* at pp. 333-334.) *Diamond II* was decided by a vote of four to three. Justice Burke authored the majority opinion and was joined by Chief Justice Wright and Justices McComb and Clark. Justice Mosk, the author of *Diamond I,* dissented in *Diamond II* and was joined by Justice Tobriner and, in part, Justice Sullivan. Justice Mosk would have reaffirmed the holding of *Diamond I* but grounded it solely on California constitutional law.

Our adherence to high court jurisprudence in this area did not last long. Shortly after our 1974 decision in *Diamond II, supra,* 11 Cal.3d 331, the composition of this court changed. This change led, in 1979, to another four-to-three decision. In *Pruneyard, supra,* 23 Cal.3d 899, we overruled *Diamond II, supra,* 11 Cal.3d 331, and effectively reinstated *Diamond I, supra,* 3 Cal.3d 653. The majority opinion, authored

by Justice Newman and joined by Chief Justice Bird and Justices Tobriner and Mosk, relied heavily on Justice Mosk's dissenting opinion in *Diamond II*. It noted that the California Constitution uses different language than does the United States Constitution in guaranteeing free speech rights. California Constitution, article I, section 2, subdivision (a) provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." The First Amendment to the United States Constitution more concisely protects "the freedom of speech."

Pruneyard held "that the soliciting at a shopping center of signatures for a petition to the government is an activity protected by the California Constitution." (*Pruneyard, supra,* 23 Cal.3d at p. 902.) More generally, it stated that the California Constitution "protect[s] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." (*Id.* at p. 910.) Justice Richardson, joined by Justices Clark and Manuel dissented. (*Id.* at pp. 911-916.) The United States Supreme Court later affirmed *Pruneyard* (*sub nom. Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74), but only to the extent of holding that federal law did not prevent California from providing greater speech rights on private shopping centers than the federal Constitution provides.

As I show in the next section, history has not been kind to the majority opinion in *Pruneyard*.

B. *Pruneyard* Revisited

Pruneyard, supra, 23 Cal.3d 899, was controversial when decided. In the three decades since then, it has received scant support and overwhelming rejection around the country. As the 2001 plurality opinion in *Golden Gateway* noted, "most of our sister courts interpreting state constitutional provisions similar in wording to California's free speech provision have declined to follow [*Pruneyard*]. [Fn. omitted.] Indeed, some of these courts have been less than kind in their criticism of [*Pruneyard*]." (*Golden Gateway, supra,* 26 Cal.4th at pp. 1020-1021.)[2] The opinion fully supported these statements with citations to decisions from the many jurisdictions that have considered but rejected *Pruneyard,* and the few that have followed its lead to a limited extent. I need not repeat those citations. (*Golden Gateway, supra,* 26 Cal.4th at pp. 1021-1022, fn. 5.)

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[2] For example, the New York Court of Appeal, in an opinion that found no right to free speech in a privately owned shopping center under a state constitutional free speech provision that is essentially identical to California's, described this court's "4-3 decision" in *Pruneyard* as "hardly persuasive authority. That court, in overruling its own contrary precedent only five years old [citing *Diamond II, supra,* 11 Cal.3d 331], simply said that the California Constitution protected speech and petitioning at private shopping centers. There is not much analysis and only tangential discussion, if it can be called that, of the State action question. It is evident that the result in [*Pruneyard*] was dictated by 'the accident of a change of personalities in the Judges of [the] court'. . . ." (*SHAD Alliance v. Smith Haven Mall* (N.Y. 1985) 488 N.E.2d 1211, 1215, fn. 5.)

As of the time we decided *Golden Gateway,* the following states, many with constitutional free speech language essentially identical to California's, had rejected any form of a *Pruneyard* approach regarding shopping centers and free speech rights: Arizona, Connecticut, Georgia, Michigan, Minnesota, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, and Wisconsin. (See *Golden Gateway, supra,* 26 Cal.4th at pp. 1020-1021 & fn. 5; *United Food v. Crystal Mall Associates* (Conn. 2004) 852 A.2d 659, 667-668 (*United Food*); Annot., Validity, Under State Constitutions, of Private Shopping Center's Prohibition or Regulation of Political, Social, or Religious Expression or Activity (1997) 52 A.L.R.5th 195.) Nevertheless, the *Golden Gateway* court followed *Pruneyard* as the law of California. The plurality, which I joined, did so reluctantly, and only due to principles of stare decisis. (*Golden Gateway, supra,* 26 Cal.4th at p. 1022.)

In the six years since we decided *Golden Gateway, supra,* 26 Cal.4th 1013, we have become yet more isolated. No new state has followed our lead. Two more states have refused to follow the *Pruneyard* approach: Hawaii and Iowa. (*State v. Viglielmo* (Hawaii 2004) 95 P.3d 952; *City of West Des Moines v. Engler* (Iowa 2002) 641 N.W.2d 803.) Moreover, as I explain, the few

states that previously adopted an approach like *Pruneyard* are generally retreating.[3]

I need not review all of the cases because three years ago the Connecticut Supreme Court did so. (*United Food, supra,* 852 A.2d 659, 667-668.) In *United Food,* the court unanimously refused to reconsider its earlier decision of *Cologne v. Westfarms Associates* (Conn. 1984) 469 A.2d 1201 (*Cologne*), which had rejected *Pruneyard* even though Connecticut's constitutional free speech provisions are essentially identical to California's. (*United Food, supra,* 852 A.2d 659.)[4] It explained that "[s]ince the decision in *Cologne,* courts in other jurisdictions that have considered this issue overwhelmingly have chosen *not* to interpret their state constitutions as requiring private property owners, such as those who own large shopping malls, to permit certain types of speech, even political speech, on their premises." (*United Food,* at p. 667.) It summarized the law that most of

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[3] Additionally, the Supreme Courts of Illinois, Nebraska, and Nevada have cited but declined to follow the *Pruneyard* approach in various free speech contexts. (*People v. DiGuida* (Ill. 1992) 604 N.E.2d 336, 340, 342-347; *Dossett v. First State Bank, Loomis* (Neb. 2001) 627 N.W.2d 131, 138-139; *S.O.C., Inc. v. Mirage Casino-Hotel* (Nev. 2001) 23 P.3d 243, 250.)

[4] Article I, section 4, of the Connecticut Constitution provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." Article I, section 5, of that Constitution provides: "No law shall ever be passed to curtail or restrain the liberty of speech. . . ." (See *United Food, supra,* 852 A.2d at p. 660, fns. 3, 4.)

the country has adopted: "Under *Cologne,* as in the overwhelming majority of our sister jurisdictions, the size of the mall, the number of patrons it serves, and the fact that the general public is invited to enter the mall free of charge do not, even when considered together, advance the plaintiff's cause in converting private action into government action." (*Id.* at p. 673.)

As explained in *United Food, supra,* 852 A.2d at pages 668-670, only four other states (Colorado, Massachusetts, New Jersey, and Washington) retain any form of independent state grounds in this area. Washington has very narrowly confined its original independent state ground decision. (*Southcenter Joint Venture v. National Democratic Policy Com.* (Wn. 1989) 780 P.2d 1282; see the discussions in *Golden Gateway, supra,* 26 Cal.4th at p. 1021, fn. 5; *United Food, supra,* 852 A.2d at pp. 668, 669 & fns. 13, 16; and *State v. Viglielmo, supra,* 95 P.3d at pp. 964-965.) Regarding Massachusetts, the Connecticut Supreme Court explained, "'The Massachusetts decision was expressly limited to the solicitation of signatures needed by political candidates for access to the ballot and relied, not upon its freedom of speech provision, but upon a state constitutional guarant[ee] of an equal right to elect officers and to be elected, for public employments. [Citation.]'" (*United Food, supra,* 852 A.2d at p. 669, quoting the court's earlier decision in *Cologne, supra,* 469 A.2d 1201.) Colorado recently permitted a shopping center to adopt substantial restraints on the exercise of free speech on its property despite its earlier *Pruneyard*-like stance.

(*Robertson v. Westminster Mall Co.* (Colo.Ct.App. 2001) 43 P.3d 622.) That leaves New Jersey; and even that state has not, to my knowledge, carried its jurisprudence to the extreme the majority is leading California.

The time has come to recognize that we are virtually alone, and that *Pruneyard* was ill-conceived. Oregon originally had its own version of *Pruneyard,* albeit one based on a different constitutional provision. (*Lloyd Corporation v. Whiffen* (Or. 1993) 849 P.2d 446.) That decision, also by a four-to-three vote, relied in part on "the decision by the California Supreme Court in [*Pruneyard*]. . . ." (*Id.* at p. 454.) Later the Oregon Supreme Court concluded that *Lloyd Corporation v. Whiffen, supra,* 849 P.2d 446, was erroneous and "disavowed" it. (*Stranahan v. Fred Meyer, Inc.* (Or. 2000) 11 P.3d 228, 243; see *Golden Gateway, supra,* 26 Cal.4th at p. 1021, fn. 5.) It also refused to find free speech rights on private property under the Oregon Constitution's free speech provision, which, like Connecticut's, is essentially identical to California's. (*Stranahan v. Fred Meyer, Inc., supra,* at pp. 243-244, fn. 19.)[5] We should do what Oregon did and disavow *Pruneyard.*

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[5] Article I, section 8, of the Oregon Constitution provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever, but every person shall be responsible for the abuse of this right." (See *Stranahan v. Fred Meyer, Inc., supra,* 11 P.3d at p. 231, fn. 3.)

In *Lloyd Corp.,* the high court distinguished its earlier decision of *Marsh, supra,* 326 U.S. 501, which involved a company town. It explained that *Marsh* "involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State. In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State." (*Lloyd Corp., supra,* 407 U.S. at p. 569, fn. omitted.) But a shopping center is different from a company town. "[P]roperty [does not] lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center." (*Ibid.*) I, along with the many jurisdictions that have followed the high court, agree.

As the plurality opinion in *Golden Gateway* explained, principles of stare decisis should make us cautious before we overrule a previous case. There should be a special justification for doing so. (*Golden Gateway, supra,* 26 Cal.4th at p. 1022.) But we do sometimes overrule our prior decisions, and appropriately so. In this case it would be entirely proper to do

so, especially in light of our increasing isolation in the six years since *Golden Gateway* was decided. The *Pruneyard* court itself ignored stare decisis. It overruled a decision of this court that was only five years old at the time. Why should a decision that overruled a recent decision, and that identified nothing that occurred in the intervening years to justify the action, be sheltered from reconsideration? In essence, there were two four-to-three decisions in the 1970's that reached opposite results. Indeed, of the 11 justices who participated in *Diamond II, supra,* 11 Cal.3d 331, or *Pruneyard, supra,* 23 Cal.3d 899, or both, a majority of six followed or would have followed the high court (Chief Justice Wright and Justices McComb, Burke, Clark, Richardson, and Manuel), and only five urged or joined what would become the *Pruneyard* approach (Chief Justice Bird, and Justices Tobriner, Mosk, Sullivan, and Newman). I would join the majority of six, as have most of the jurisdictions that have considered the question.

Moreover, the *Pruneyard* court made no effort to find anything in the text of article I, section 2, subdivision (a) of the California Constitution, its historical sources, or the process that led to its adoption, that suggests any intent to extend its terms to private property. Instead, as the Wisconsin Supreme Court observed in a case that rejected *Pruneyard* even though Wisconsin's constitutional free speech provision is essentially identical to California's, "the majority [in *Pruneyard*] did not analyze the constitutional sections, but rather summarily stated the protections

granted by those sections. It appears to be more a decision of desire rather than analytical conviction." (*Jacobs v. Major* (Wis. 1987) 407 N.W.2d 832, 841.)[6]

I do not denigrate free speech rights. As the New York Court of Appeal stated in its opinion rejecting *Pruneyard,* "the right to free expression is one of this Nation's most cherished civil liberties." (*SHAD Alliance v. Smith Haven Mall, supra,* 488 N.E.2d at p. 1212; see also *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 970-977 (dis. opn. of Chin, J.).) But free speech rights and private property rights can and should coexist. The last 30 years have not seen a significant diminution of free speech opportunities in the many jurisdictions that have followed the high court's lead regarding private property. The Union here is not without recourse if it wants to urge a lawful boycott of any business or engage in any other protected freedom of expression. It has plenty of outlets to exercise its free speech rights. If it wants to picket, it simply has to do so on public property or seek permission from private property owners. The Union can exercise its free speech rights, for example, just outside the shopping center, including near the entrances. Additionally, and especially today with the

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[6] Article I, section 3, of the Wisconsin Constitution provides: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press." (See *Jacobs v. Major, supra,* 407 N.W.2d at p. 833, fn. 1.)

advent of the Internet and other forms of mass communication, "other public forums [are available] for the distribution and dissemination of . . . ideas." (*Diamond II, supra,* 11 Cal.3d at p. 334.) But I would find no right to engage in speech activity on private property over the owner's objection.

C. Pruneyard Distinguished

Even if we stubbornly maintain our position of "magnificent isolation"[7] in the face of this tide of history, we should not carry *Pruneyard* to the extreme of forbidding private property owners from controlling expressive activity on their property – urging a boycott of its tenants – that is *inimical* to the purpose for which the property is being used. *Pruneyard* is readily distinguishable.

Assuming free speech rights exist in shopping centers, the fact remains that they are not Hyde Park in London, Central Park in New York, or the National Mall in Washington, D.C., areas that are quintessential public free speech zones. Shopping centers are private property dedicated to doing business. Their owners should not have to permit all expressive activity that the California and United States Constitutions protect in public places. A shopping center

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[7] The court in *Andersen v. United States* (9th Cir.1956) 237 F.2d 118, 127, so described the position of the two jurisdictions that adopted or followed the infamous "product rule" for insanity stated in *Durham v. United States* (D.C. Cir. 1954) 214 F.2d 862.

owner should be allowed to enforce reasonable restrictions to protect its business activities even if the government could not impose similar restrictions. Rule 5.6.2 is such a restriction.

In *Pruneyard,* the activity the majority compelled a shopping center owner to permit on its property was the soliciting of signatures for a petition to the government. (*Pruneyard, supra,* 23 Cal.3d at p. 902.) Likewise, in *Diamond I,* the activity was "securing signatures on two anti-pollution initiative petitions." (*Diamond I, supra,* 3 Cal.3d at p. 655.) Soliciting petition signatures, and much other free speech activity, although perhaps not furthering the shopping center's business, is fully compatible with that business. The same is not true here. The purpose of a shopping center is to provide a place where the tenants, i.e., the individual businesses, may do business. Urging a boycott of a tenant's business is antithetical to that purpose. We should not compel shopping center owners to permit activity that interferes with the purpose for the center's existence.

Pruneyard's own analysis permits this conclusion. "By no means do we imply that those who wish to disseminate ideas have free rein. . . . [A]s Justice Mosk stated in *Diamond II,* '. . . A handful of additional orderly persons soliciting signatures and distributing handbills in connection [with the shopping center], under reasonable regulations adopted by defendant to assure that these activities do not interfere *with normal business operations* (see *Diamond* [*I*] at p. 665) *would not markedly dilute defendant's*

property rights.' (11 Cal.3d at p. 345 (dis. opn. of Mosk, J.).)" (*Pruneyard, supra,* 23 Cal.3d at pp. 910-911, italics added.)

Diamond I was also limited in its reach. We stressed that "[i]t bears repeating that no evidence was presented to the trial court that plaintiffs' activities actually interfered with the normal business operations of the [shopping center]. Plaintiffs do not contend that they are entitled to use private property for the dissemination of ideas without limitations *imposed by reasonable regulations designed to protect the business activities* of the Center. . . . [¶] We impose no unrealistic burden on the operators of shopping centers in insisting that their control over First Amendment rights [obviously, now limited to free speech rights under the California Constitution] be exercised, if at all, through *reasonable regulations calculated to protect their business interests* rather than through absolute bans on all nonbusiness-related activities. Shopping centers . . . are not incapable of regulating permissible activities." (*Diamond I, supra,* 3 Cal.3d at p. 665, fn. omitted, italics added.)

A reasonable interpretation of these decisions, and one that would at least nudge this court toward the judicial mainstream, is that shopping center owners may impose reasonable regulations to protect their business interests, and that rule 5.6.2 is such a reasonable regulation. Compelling property owners to permit use of their property that would hinder business success *would* markedly dilute their property

rights. Fashion Valley should at least be able to protect its business interests by enforcing rule 5.6.2.

It is true that two old cases that predate *Hudgens, supra,* 424 U.S. 507, *Lloyd Corp., supra,* 407 U.S. 551, and *Diamond II, supra,* 11 Cal.3d 331, involved boycotts. (*Lane, supra,* 71 Cal.2d 872; *Schwartz-Torrance, supra,* 61 Cal.2d 766.) It is also true that the majority opinion in *Pruneyard* cited those cases with approval. (*Pruneyard, supra,* 23 Cal.3d at pp. 908-909.) But the fact remains that they were based in large part on federal law that has since been discredited, and the belief that federal and state constitutional law coincided in this area. *Pruneyard* should at least be interpreted on its facts and its holding. It cannot somehow have revalidated old cases that had different facts and were decided under a legal landscape that is now obsolete.

Lane involved "an individual grocery store." (*Lane, supra,* 71 Cal.2d at p. 873.) But recent Court of Appeal decisions have definitively held that *Pruneyard* does *not* extend to stand-alone stores like the one in *Lane*. (*Albertson's, Inc. v. Young* (2003) 107 Cal.App.4th 106 [grocery store]; *Trader Joe's Co. v. Progressive Campaigns, Inc.* (1999) 73 Cal.App.4th 425 [retail store]; see also *Waremart Foods v. N.L.R.B.* (D.C. Cir. 2004) 354 F.3d 870 [grocery store].) These cases found *Pruneyard's* citation of *Lane* and *Schwartz-Torrance* not dispositive. As the *Albertson's, Inc.* court noted in refusing to follow *Lane*, "we are not aware of any legal principle by which a court, years after rendering a decision, can

retroactively alter its ratio decidendi." (*Albertson's, Inc., supra,* at p. 123; see also *Trader Joe's Co., supra,* at p. 436 [*Pruneyard's* reference "to *Lane* was brief and collateral"].)

Today's majority opinion carefully says nothing casting doubt on the recent cases involving stand-alone stores, and they are surely correct. But if the older cases cited in *Pruneyard* are no longer authoritative in *that* respect, why should they be any more authoritative in *this* respect? In fact, they are no longer authoritative at all. If we are to preserve *Pruneyard,* we should at least interpret it on its own, and not be bound by ancient cases based on law that has long since disappeared.

The majority is also inconsistent in its treatment of First Amendment law. It rejects First Amendment law entirely as it relates to private property – law that is directly on point here – but then it relies heavily on First Amendment cases that involve restrictions the *government* has placed on speech. (Maj. opn., *ante,* at pp. 19-24.) It cites the federal strict scrutiny test that applies to *governmental* restrictions and that requires the government to show the restriction serves a compelling *state* interest. (*Id.* at p. 23.) It relies on, and quotes selectively from, *Turner Broadcasting System, Inc. v. FCC* (1994) 512 U.S. 622, 642, which says, "'The *government* may not regulate [speech] based on hostility – or favoritism – towards the underlying message expressed.'" (Italics added; see maj. opn., *ante,* at p. 23.) It then asserts, with no apparent awareness of the

distinction – vital under the First Amendment – between governmental action and actions by private property owners, that the same rules apply here. (*Ibid.*)

The strict scrutiny test that applies to the government has no application to action by private landowners involving their own property. Even if it did, it would have to be adapted to recognize the fact that no governmental action is involved. The compelling *state* interest test would have to yield to some kind of "compelling landowner interest" test. A property owner can assert its own interests only, not the state's. If that test applied here, it would be met. Furthering business on its private property is not only a compelling interest, it is the property owner's primary concern; doing business is the reason the shopping center exists. In implementing rule 5.6.2, Fashion Valley is merely preventing persons from using its property to urge potential patrons not to do business with its tenants. The Union may urge a boycott if it wishes, just not on private property without permission.

In finding no compelling interest, the majority merely asserts that the right of persons to use property they do not own is more compelling than the landowner's right to use its own property for the very purpose it exists. (See maj. opn., *ante,* at p. 23.) I would instead give *some* priority to the property's owner. The bankruptcy of the majority's position is shown by its further assertion that "[t]he Mall cites no authority, and we are aware of none, that holds

that a store has a compelling interest in prohibiting this traditiona. form of free speech." (Maj. opn., *ante,* at p. 24.) Good reason exists for this lack of authority. Because most of the country, including the United States Supreme Court, rejects the very notion of free speech rights on private property, *the issue never arises.* Only in California is the issue relevant. The only *tradition* that is relevant to this case is the tradition, followed in most of the country, of finding no free speech rights on private property. The majority is trampling on tradition, not following it.

I would find rule 5.6.2 valid even under *Pruneyard.*

III. Conclusion

I would answer the certified question the District of Columbia Circuit posed as follows: Under California law, Fashion Valley may maintain and enforce against the Union its rule 5.6.2. Additionally, I would overrule *Pruneyard, supra,* 23 Cal.3d 899. The time has come for this court to join the judicial mainstream.

Accordingly, I dissent.

CHIN, J.

WE CONCUR:

BAXTER, J.
CORRIGAN, J.

U.S. Court of Appeals for the
District of Columbia Circuit – No. 04-1411
S144753

IN THE SUPREME COURT OF CALIFORNIA

En Banc

FASHION VALLEY MALL, LLC, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent; GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 432-M, Real Party in Interest.

(Filed Feb. 20, 2008)

The petition for rehearing is denied.

Baxter, Chin, and Corrigan, JJ., are of the opinion the petition should be granted.

GEORGE
Chief Justice

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Supreme Court, U.S.
FILED
AUG 22 2008
OFFICE OF THE CLERK

No. 07-1454

In the Supreme Court of the United States

FASHION VALLEY MALL, LLC, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether this Court has jurisdiction pursuant to 28 U.S.C. 1257(a) to undertake direct review of a state supreme court opinion answering a question of state law certified to it by a federal court of appeals, where the court of appeals retained jurisdiction to decide the federal questions presented in the case, and where the federal question on which petitioner seeks review was neither timely pressed nor passed upon by the state supreme court.

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In the Supreme Court of the United States

No. 07-1454

FASHION VALLEY MALL, LLC, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of California answering a question of state law certified to it by the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1-53) is reported at 172 P.3d 742. The opinion of the court of appeals enforcing the order of the National Labor Relations Board (Board) after receiving the answer of the California Supreme Court to the court of appeals' certified question (App., *infra*, 1a-5a) is reported at 524 F.3d 1378. The order of the court of appeals certifying the question of state law to the Supreme Court of California (App., *infra*, 8a-22a) is reported at 451 F.3d 241. The decision and order of the Board (App., *infra*, 23a-33a) are reported at 343 N.L.R.B. 438.

JURISDICTION

The opinion of the Supreme Court of California, answering a certified question of state law, was entered on December 24, 2007. A petition for rehearing was denied on February 20, 2008 (Pet. App. 54). The petition for a writ of certiorari was filed on May 20, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a). For reasons explained below, however (see pp. 8-17, *infra*), this Court lacks jurisdiction because the interlocutory decision of the California Supreme Court answering a certified question of state law, which does not address the federal constitutional question petitioner raised for the first time in its petition for rehearing, is not a "[f]inal judgment[]" deciding a "right * * * specially set up or claimed under the [United States] Constitution," 28 U.S.C. 1257(a).

STATEMENT

1. An employer that has, under state law, a right to exclude others from its property does not generally violate the National Labor Relations Act (NLRA or the Act), 29 U.S.C. 151 *et seq.*, when it prevents nonemployees from entering upon its property to distribute union literature. See *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 537-538 (1992). When an employer lacks such a state-law right, it violates Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by excluding or seeking to exclude nonemployees engaged in activity protected by Section 7 of the NLRA, 29 U.S.C. 157.[1] See *NLRB* v. *Calkins*,

[1] Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act, 29 U.S.C. 157, which in turn ensures the right of employees "to self-organization, to form, join, or assist labor organizations, to bargain

187 F.3d 1080, 1083, 1095-1096 (9th Cir. 1999), cert. denied, 529 U.S. 1098 (2000). See generally *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 217 n.21 (1994) ("The right of employers to exclude union organizers from their private property emanates from state common law."). The Board therefore looks to state law to ascertain whether an employer has a property right sufficient to deny access to nonemployee individuals engaged in activity protected by Section 7 of the NLRA. *Glendale Assocs., Ltd.*, 335 N.L.R.B. 27, 28 (2001), enforced, 347 F.3d 1145 (9th Cir. 2003).

2. Petitioner owns a large shopping mall in San Diego, California. Pet. App. 2, 3 n.2. Petitioner permits certain expressive activities in the common areas of the mall by those who apply for a permit and agree to abide by its regulations. *Id.* at 3-4. One such regulation, Rule 5.6.2, requires permit applicants to refrain from "[u]rging, or encouraging in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the shopping center." *Id.* at 4.

In October 1998, approximately 30 members and supporters of the Graphic Communications International Union (Union) gathered outside a department store in the mall to distribute handbills advertising the Union's labor dispute with a local newspaper. Pet. App. 2-3. The Union decided to stage a protest at the mall because the department store advertises in the newspaper and is located near the newspaper's premises. *Id.* at 3. Shortly after the handbilling began, a representative of the mall approached the protestors, explained that a permit

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collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

was required for their expressive activity, and told them to leave the premises. *Ibid.*

3. Acting on an unfair labor practice charge filed by the Union, the Board's General Counsel issued a complaint, alleging, *inter alia*, that petitioner violated Section 8(a)(1) by prohibiting participants in expressive activity from urging customers to refrain from shopping at stores located in the mall. *Equitable Life Assurance Soc'y of the U.S. & ITC Fashion Valley Corp.*, 343 N.L.R.B. 438, 441 (2004). After a hearing, an administrative law judge (ALJ) issued a decision finding that petitioner violated Section 8(a)(1) by enforcing Rule 5.6.2 and unlawfully excluding the union handbillers. *Id.* at 449.

On review, the Board issued an opinion and order, App., *infra*, 23a-33a, affirming the ALJ's finding of that unfair labor practice, *id.* at 29a. Ruling on a separate allegation on which the ALJ had declined to rule, the Board also found that petitioner's maintenance of the rule violated Section 8(a)(1). *Id.* at 28a.

After acknowledging that property owners generally do not violate the Act by exercising their state-law property right to exclude nonemployee union organizers from private property, the Board analyzed California law to determine whether it granted petitioner the right to exclude individuals advocating a boycott of a mall business. App., *infra*, 27a-28a. The Board concluded that California law did not grant the mall owner that right. *Id.* at 28a. In so concluding, the Board relied on the California Supreme Court's decision in *Robins* v. *Pruneyard Shopping Center*, 592 P.2d 341 (1979) (*Pruneyard*), aff'd, 447 U.S. 74 (1980), which held, construing state property law in light of the State's constitution, that private shopping centers that were other-

wise open to the public could not prevent individuals from engaging in speech or petitioning, subject to reasonable time, place, and manner rules adopted by the property owner. App., *infra*, 28a. Applying that decision, the Board determined that petitioner's Rule 5.6.2 was invalid under California law as a content-based restriction on access to a shopping mall otherwise open to the public, and therefore concluded that petitioner violated Section 8(a)(1) by maintaining the rule and by requiring the Union to adhere to it as part of the permit process. *Id.* at 28a-29a.

4. Petitioner sought review of the Board's order before the United States Court of Appeals for the District of Columbia Circuit, and the Board cross-applied for enforcement of its order. After briefing and oral argument, the court of appeals issued an opinion, App., *infra*, 8a-22a, concluding that "no California court has squarely decided whether a shopping center may lawfully ban from its premises speech urging the public to boycott a tenant." *Id.* at 18a. The court therefore certified the following question to the Supreme Court of California: "Under California law may [petitioner] maintain and enforce against the Union its Rule 5.6.2?"[2] *Id.* at 19a. The court further stated that it would "hold this case in abeyance pending a response from that court." *Ibid.*

5. The Supreme Court of California granted the D.C. Circuit's request. The Board did not file a brief or appear at oral argument before the California Supreme Court, but instead filed a letter with the clerk of the court explaining that the Board "has no institutional

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[2] That action was authorized by California Rule of Court 8.548(a), which provides that a court of appeals may certify "a question of California law if: (1) [t]he decision could determine the outcome of a matter pending * * * and (2) [t]here is no controlling precedent."

interest in how California resolves the state property law question" that the D.C. Circuit had certified. App., *infra*, 35a. Rather, the letter explained, the Board had in its order "merely attempt[ed] to give effect to its understanding of California property law." *Ibid.*

In a decision dated December 24, 2007 (Pet. App. 1-53), the Supreme Court of California held that, under its decision in *Pruneyard*, the property rights of a mall owner to exclude members of the public are limited by "the right to free speech granted by article I, section 2 of the California Constitution[, which] includes the right to urge customers in a shopping mall to boycott one of the stores in the mall." *Id.* at 1, 7-8. Analyzing *Pruneyard* and California Supreme Court decisions that preceded it (*id.* at 7-18), the court concluded that it had long been the law of the State, "and remains the law, that a privately owned shopping center must permit peaceful picketing of businesses in shopping centers, even though such picketing may harm the shopping center's business interests." *Id.* at 19. The court therefore answered the certified question as follows: "We hold * * * [petitioner] may not maintain and enforce against the Union its rule 5.6.2." *Id.* at 31. Three members of the court dissented, contending that the court "should overrule *Pruneyard*" or at least distinguish it. *Id.* at 35. .

Petitioner sought rehearing before the California Supreme Court. In its petition for rehearing, petitioner argued for the first time that the court's answer to the certified question resulted in a taking of its property in violation of the Fifth Amendment to the United States Constitution. Pet. for Reh'g 2-9. The California Supreme Court denied rehearing without comment on February 20, 2008. Pet. App. 54.

6. Although not mentioned in the petition for a writ of certiorari, on May 9, 2008, before the petition was filed, the D.C. Circuit issued an opinion and order enforcing the Board's order in light of the California Supreme Court's decision and declining to address petitioner's Takings Clause argument on the ground that it had been waived. App., *infra*, 1a-5a.

Shortly after the Supreme Court of California issued its decision on December 24, 2007, answering the certified question, the D.C. Circuit had issued an order directing petitioner to "show cause * * * why the court should not deny its petition for review and grant the Board's cross-application for enforcement." App, *infra*, 7a. In its response, petitioner advanced its takings argument, acknowledging that the California Supreme Court had denied the petition for rehearing in which petitioner had raised the issue for the first time. See *id.* at 2a.

In its May 9, 2008, decision granting the Board's application for enforcement of its order and denying petitioner's petition for review, the court of appeals did not address the merits of petitioner's takings argument. Rather, the court held that petitioner had "forfeited its constitutional argument" by not asserting it initially in the petition for review of the Board's decision. App, *infra*, 3a. The court rejected petitioner's contention that the issue could not have been raised earlier, observing that "the decision of the Supreme Court of California did not inject any new constitutional issue into the case," because that court had "merely confirmed that the interpretation of California law long followed by the Board was correct." *Id.* at 4a. The court of appeals noted that if petitioner had raised the constitutional issue in its petition for review of the Board's decision, that

fact might have affected the court of appeals' decision to certify the question of state law or the California Supreme Court's answer to that question. *Ibid.*

ARGUMENT

The opinion of the Supreme Court of California answering a question of state law certified to it by the court of appeals is not a "[f]inal judgment[] or decree[]" within the meaning of 28 U.S.C. 1257(a), the jurisdictional provision that governs this Court's review of state-court decisions. Nor did the state court's opinion decide "any title, right, privilege, or immunity * * * specially set up or claimed under the Constitution or the treaties or statutes of * * * the United States." *Ibid.* Because this Court lacks jurisdiction to review the question of state law addressed by the Supreme Court of California's interlocutory opinion, the petition for a writ of certiorari should be denied.

1. This Court's jurisdiction to review state-court decisions is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of * * * the United States." 28 U.S.C. 1257(a). That provision embodies a "firm final judgment rule," *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 81 (1997), and "is not one of those technicalities to be easily scorned," *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945). Rather, faithful adherence to the rule is "an important factor in the smooth working of our federal system." *Ibid.* To satisfy Section 1257(a), a state-court decision must be final in two senses: first, it "must be subject to no further review or correction"; and, second, it must be "an effective deter-

mination of the litigation and not of merely interlocutory or intermediate steps therein." *Market St. Ry.* v. *Railroad Comm'n*, 324 U.S. 548, 551 (1945).

The opinion of the California Supreme Court answering the question of state law certified to it by the court of appeals is not a final judgment under Section 1257(a). Answering only the question certified to it by the D.C. Circuit, the state supreme court clarified the pertinent issue of state law by holding that, under the state constitution, a shopping mall may not prohibit expressive activity urging a consumer boycott of a mall tenant. Pet. App. 30-31. That decision did not, nor could it, terminate the controversy pending between the parties in the D.C. Circuit—over which the D.C. Circuit explicitly retained jurisdiction and which the California Supreme Court could not decide—whether petitioner violated Section 8(a)(1) of the NLRA and whether the Board's order against petitioner should be enforced. App., *infra*, 18a-19a; see Richard Fallon, Jr. et al., *Hart and Wechsler's the Federal Courts and the Federal System* 1200-1201 (5th ed. 2003) (certification procedures "permit federal courts, while retaining jurisdiction of a case, to seek a state court's authoritative resolution of unsettled state law issues"). Accordingly, the California Supreme Court's decision pursuant to the court of appeals' certification was merely an "intermediate step[]," not the "final word," in the litigation. *Jefferson*, 522 U.S. at 81 (quoting *Market St. Ry.*, 324 U.S. at 551).

Although this Court in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 479-485 (1975), identified four categories of state-court decisions that can be final under Section 1257(a) notwithstanding the pendency of proceedings on remand in lower state courts, *Cox* is inappli-

cable here.[3] The four *Cox* categories identify situations in which the state court has decided a federal issue, and, absent certiorari, there would be no timely or meaningful federal court review of the federal claim. See *Florida* v. *Thomas*, 532 U.S. 774, 778-780 (2001) (summarizing the situations in which the *Cox* exceptions permit review). Here, no question of federal law was certified to or decided by the state court. Indeed, the certification procedure does not contemplate that the state court will decide federal issues, for as this Court has observed, "certified questions should be confined to uncertain questions of state law." *City of Houston* v. *Hill*, 482 U.S. 451, 471 n.23 (1987) (noting that it would be "inappropriate for a federal court to certify [an] entire constitutional challenge to the state court"). Although the California Supreme Court could have taken federal constitutional constraints into consideration in construing state law, the federal court that certified the question of state law retains jurisdiction to decide all properly preserved federal questions in the case, subject to review

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[3] The categories are (1) "cases in which there are further proceedings * * * yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained," (2) "cases * * * in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings," (3) "situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case," or (4) "situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, * * * and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Cox*, 420 U.S. at 479-483.

by this Court. See, *e.g.*, *Government & Civic Employees Org. Comm.* v. *Windsor*, 353 U.S. 364, 366-367 (1957) (per curiam) (remanding to a federal three-judge district court a First Amendment challenge to a state law prohibiting public employees from joining a union "*with directions to retain jurisdiction* until efforts to obtain an appropriate adjudication in the state courts" interpreting the state statute in question in light of the union's federal Constitutional arguments "have been exhausted" (emphasis added)).[4]

The state supreme court's answer to a question of state law certified to it by a federal court has no immediate impact on the rights of the litigants, any more than if the federal court had undertaken itself to answer the state law issue at an interlocutory stage of the case instead of certifying it to the state supreme court. And

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[4] *Windsor* arose under the procedures announced in *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941) (*Pullman*), under which a federal court may abstain from resolving a federal question by encouraging the initiation of a state-court proceeding in which a final ruling on an issue of state law may moot the federal question. *Id.* at 501. Because, under *Pullman*, an independent state-court action is initiated, see *ibid.*, it is sometimes possible for a party to "elect[] to seek a complete and final adjudication of [its] rights in the state courts," including its federal constitutional rights, *NAACP* v. *Button*, 371 U.S. 415, 427 (1963). In such a case, this Court would have jurisdiction pursuant to Section 1257(a) to review the federal question decided by the final judgment of the state court. See *Id.* at 427. In contrast, as we explain in the text, pp. 9-14, the answer provided by a state court to a certified question is not a final judgment deciding the rights of the parties, but an interlocutory step preceding a final adjudication of the parties' rights by the federal court that retains jurisdiction. And, in any event, petitioner, which did not raise its federal constitutional argument in the California Supreme Court until its petition for rehearing, plainly did not seek a "complete and final" adjudication of its constitutional rights in that court. See pp. 14-17, *infra*.

such an interlocutory resolution of a state law issue might ultimately have no adverse effect on the party challenging it if the federal court later rules on final judgment in that party's favor on *other* grounds—including that the interpretation of state law results in a violation of the federal Constitution.

Moreover, to allow direct review in this Court of a state court's answer to a certified question of state law in the midst of ongoing federal litigation would disrupt the certification procedure and undermine its core policies of comity and judicial economy. Certification is meant to provide a less cumbersome alternative to abstention by "allow[ing] a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 76 (1997). If this Court were to entertain direct certiorari review where a state court's response to a certified question of state law arguably raises a federal question, the resulting delay in the ultimate resolution of the case or the possibility of piecemeal litigation could dissuade federal courts from utilizing the procedure. In that event, federal courts are more likely to risk the kinds of "friction-generating error[s]" that result when federal courts attempt to rule on novel issues of state law without the authoritative guidance of the states' highest courts. *Id.* at 79.

The proper course for petitioner thus would have been to raise its federal Takings Clause challenge to the purported state-law limitation on its property rights in the federal court of appeals in which the enforcement proceeding was pending and then petition for a writ of certiorari from that court's final judgment if necessary.

See, *e.g.*, *Toll* v. *Moreno*, 441 U.S. 458, 462 (1979) (per curiam) (remanding case to federal district court to consider in the first instance questions of federal law raised by clarification of state law after certification by this Court to the Maryland Court of Appeals). In this case, however, petitioner forfeited its constitutional argument in the federal court of appeals by failing to raise the issue in a timely fashion. App., *infra*, 3a. As the court of appeals held, petitioner should have raised its Takings Clause claim at the outset in its petition for review from the Board's order, which construed California law in the same way the California Supreme Court ultimately did. *Id.* at 3a-4a.[5] If petitioner had done so, that claim could have been taken into account by the D.C. Circuit in deciding whether to certify the state-law issue, and by the California Supreme Court in answering that question. See *id.* at 4a.

Petitioner did not file a petition for a writ of certiorari challenging the court of appeals' May 2008 judgment enforcing the Board's order on the ground that it resulted in a taking of petitioner's property without just compensation, and any such petition would have failed

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[5] The court of appeals did not decide whether petitioner forfeited its constitutional argument for the additional reason that petitioner had failed to raise it before the Board in the first instance. App., *infra*, 2a-3a. Section 10(e) of the Act, 29 U.S.C. 160(e), deprives an appellate court, including this Court, of jurisdiction to review any issue not raised before the Board. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982). That bar applies even to those belated challenges to a Board order that are constitutional in nature. See *International Ladies' Garment Workers' Union, Upper S. Dep't* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (holding that party's due process challenge was barred by Section 10(e)); *Polynesian Cultural Ctr., Inc.* v. *NLRB*, 582 F.2d 467, 473 (9th Cir. 1978) (same with regard to party's First Amendment challenge).

in light of petitioner's forfeiture of its Takings Clause argument. See *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416-417 (2001) (declining to permit petitioner to assert new substantive arguments attacking the judgment when those arguments were not pressed or passed on by the court below). Although petitioner's forfeiture of its federal constitutional claim in the federal court where the enforcement proceeding was pending would have caused this Court to deny a petition for review from the court of appeals, plainly that consequence of petitioner's waiver gives petitioner no greater claim to "finality" with respect to the state court's opinion answering the certified question of state law.[6]

2. Even assuming that the opinion of the California Supreme Court is a final judgment for purposes of Section 1257(a), the petition for a writ of certiorari should be denied for a second, independent reason—petitioner failed to present in a timely fashion its federal constitutional claim to the state court, which did not address it. Section 1257(a) grants this Court jurisdiction to review the final judgment of a state court "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of * * * the United States." 28 U.S.C. 1257(a).

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[6] In its response to the court of appeals' order to show cause, petitioner urged the court of appeals to stay its proceedings, in order to give this Court the "first opportunity," through a petition for a writ of certiorari to the California Supreme Court that had yet to be filed, "to resolve the U.S. Constitutional issues raised by the manner in which the California Supreme Court answered [the court of appeals'] certified question." 04-1411 Pet. Resp. to Order to Show Cause 6-7 (D.C. Cir.). That suggestion inverts the proper order. The lower courts should first have an opportunity to address the constitutional question, or resolve the case on other grounds and thereby obviate the need for the constitutional issue to be resolved.

Because petitioner did not raise its constitutional claim before the state court in a timely fashion, review by this Court under Section 1257(a) would be inappropriate.[7]

This Court has long "adhered to the rule in reviewing state-court judgments under 28 U.S.C. § 1257(a) that [it] will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision [the Court has] been asked to review." *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997) (per curiam); see *Howell* v. *Mississippi*, 543 U.S. 440, 443 (2005) (per curiam); *Webb* v. *Webb*, 451 U.S. 493, 496-497 (1981). Because the California Supreme Court decision "is silent on [the] federal question," this Court will "assume that the issue was not properly presented" unless petitioner carries "the burden of defeating this assumption." *Adams*, 520 U.S. at 86-87. Petitioner fails to carry that burden here.

Petitioner concedes that it did not raise the issue until its petition for rehearing in the California Supreme Court. Pet. 11-12. As such, that argument was procedurally defaulted under that court's "well settled" rule that it will not entertain arguments "raised for the first time in a petition for rehearing." *Reynolds* v. *Bement*, 116 P.3d 1162, 1172-1173 (Cal. 2005) (citation omitted). The California Supreme Court denied the petition for rehearing without comment. Pet. App. 54. This Court

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[7] Many decisions of the Court have discussed the requirement that a federal question be pressed or passed upon by the state court as a jurisdictional limitation under Section 1257(a) and its statutory antecedents. See, *e.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Duel*, 324 U.S. 154, 160 (1945); *Crowell* v. *Randell*, 35 U.S. (10 Pet.) 368, 392 (1836) (Story, J.). More recently, the Court has declined to decide whether the rule is "jurisdictional or prudential." *Adams* v. *Robertson*, 520 U.S. 83, 90 (1997) (per curiam); see *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); *Illinois* v. *Gates*, 462 U.S. 213, 219 (1983).

has consistently assumed that a state court's silence in the face of belatedly-raised issues is "due to want of proper presentation." *Board of Dirs. of Rotary Int'l* v. *Rotary Club*, 481 U.S. 537, 549-550 (1987) (*Rotary Int'l*) (quoting *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 181 n.3) (1983)). Accordingly, this Court will "refuse[] to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question." *Adams*, 520 U.S. at 89-90 n.3 (citing *Rotary Int'l*, 481 U.S. at 549-550; *Hanson* v. *Denckla*, 357 U.S. 235, 244 n.4 (1958); *Radio Station WOW*, 326 U.S. at 128).

Petitioner nonetheless urges, relying on this Court's decision in *Cox*, that by presenting its Takings Clause argument to the California Supreme Court in the petition for rehearing, petitioner preserved the issue for this Court's review. Pet. 1-2. In *Cox*, however, the state court's denial of rehearing was accompanied by the statement that "[a] majority of this court does not consider this statute to be in conflict with the [U.S. Constitution]." 420 U.S. at 476 (citations omitted). The absence of any comment from the California Supreme Court on the merits of the constitutional issue on which petitioner seeks review by this Court distinguishes this case from *Cox*. See Eugene Gressman et al., *Supreme Court Practice* 193-194 (9th ed. 2007) ("To constitute a reviewable judgment" under Section 1257(a), "the order denying the petition for rehearing must be more than a cursory recitation that the petition has been fully or maturely considered," rather, "[t]here must be language indicating that the federal question was considered and disposed of.").

Moreover, although this Court has indicated that a party adequately preserves a federal claim if it presents it upon its first opportunity, such as "when the highest

state court renders an unexpected interpretation of state law or reverses its prior interpretation," *Prune-Yard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 86 n.9 (1980), that rule is of no benefit to petitioner here. In *Prune-Yard Shopping Center*, the Court held that the mall owners were not barred from raising a federal constitutional claim by their failure to raise that claim before the lower state courts, which were bound by state supreme court precedent favorable to the mall owners. *Id.* at 86-87 n.9. The Court noted, however, that "[o]nce before the California Supreme Court," which had the power to overrule that precedent, the mall owners "explicitly presented their federal constitutional right" in their brief. *Ibid.* Here, by contrast, petitioner failed to assert its federal right before the California Supreme Court until the petition for rehearing, even though the Board's decision, which tracked the analysis of the California Supreme Court's own opinion in relevant regard, had already found that California law protected the right of the picketers to urge a boycott of a mall tenant. App., *infra*, 27a-29a. As the D.C. Circuit stated, in holding that petitioner had waived its constitutional argument in the D.C. Circuit as well by failing to raise it initially in its petition for review from the Board's decision, "the decision of the Supreme Court of California did not inject any new constitutional issue into the case," but rather "merely confirmed that the interpretation of California law long followed by the Board was correct." *Id.* at 4a.

3. As noted above, the Board did not participate in briefing or argument before the California Supreme Court because, as the Board explained, the NLRA merely gives effect to state property law, and the Board therefore "has no institutional interest in how California

resolves the state property law question" that the D.C. Circuit certified. App., *infra*, 35a.

Although the Board has no interest in the resolution of the question of state law per se, we note that petitioner's disagreement with the state court's construction of state law does not rise to the level of a federal constitutional violation. Just as the Board takes state-law property rights as the starting point of its analysis, this Court takes "the restrictions that background principles of the State's law of property and nuisance already place upon land ownership" as the baseline against which a Takings Clause challenge under the federal Constitution is measured. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). Even if a state supreme court's judgment might violate the Fifth Amendment if it were merely a "pretext[]" for "eliminat[ing] property rights," see *Stevens* v. *City of Cannon Beach*, 510 U.S. 1207, 1211 (1994) (Scalia, J., dissenting from the denial of certiorari); see also *Lucas*, 505 U.S. at 1031 (citing *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980)), no such claim could be made here.

The California Supreme Court construed state property law in light of language that has been part of the California Constitution without substantive change since its original adoption in 1849. Compare Cal. Const. Art. 1, § 2(a), with Cal. Const. of 1849, Art. 1, § 9. The question presented, both before the Board and the California Supreme Court, was the proper construction of that constitutional guarantee in light of the state court's 1979 *Pruneyard* decision, which this Court affirmed, *PruneYard Shopping Ctr.*, 447 U.S. at 88. See Pet. App. 7-9;

App., *infra*, 27a-28a.[8] Even the dissenters in the California Supreme Court characterized the question as whether the court "should overrule *Pruneyard*" or else distinguish it. Pet. App. 35. This is hardly a case, therefore, in which a state court has "by *ipse dixit* * * * transform[ed] private property into public property without compensation." *Lucas*, 505 U.S. at 1031 (quoting *Webb's Fabulous Pharmacies*, 449 U.S. at 164).

Accordingly, even if petitioner could overcome the obstacles to certiorari resulting from its failure to file a certiorari petition to review the operative final judgment of the D.C. Circuit in this case—and from its failure to raise the federal constitutional issue in a timely manner before either the D.C. Circuit or the California Supreme Court—review by this Court would not be warranted.

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[8] The California Supreme Court found that its conclusion regarding the question presented was supported by other California decisions that predated *Pruneyard* by as much as fifteen years. See Pet. App. 19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1411
Consolidated with
05-1027 & 05-1039

FASHION VALLEY MALL, LLC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

GRAPHIC COMMUNICATIONS CONFERENCE,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 432(M), INTERVENOR

Argued: Dec. 13, 2005
Decided: May 9, 2008

ON PETITION FOR REVIEW AND APPLICATION AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: SENTELLE, Chief Judge, GINSBURG, Circuit Judge, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge:

Fashion Valley owns a shopping mall in San Diego, California. It allows individuals and organizations to engage in expressive activities on its premises if they get a permit; in order to get a permit, an applicant must promise not to urge consumers to boycott any of the mall's tenants. The NLRB concluded this policy violated the right to free speech guaranteed by the Constitution of California and therefore held it was an unfair labor practice; Fashion Valley petitioned this court for review. We agreed that "whether Fashion Valley violated the [National Labor Relations] Act depends upon whether it had the right, under California law, to maintain and enforce its anti-boycott rule." 451 F.3d 241, 242 (2006). Accordingly, we certified that question to the Supreme Court of California, which held Fashion Valley's policy violated the right to free speech guaranteed by the Constitution of California, 42 Cal. 4th 850, 69 Cal. Rptr. 3d 288, 172 P.3d 742 (2007), and later denied Fashion Valley's petition for rehearing.

Fashion Valley now claims the interpretation of the Constitution of California requiring it to allow protesters on its premises to urge a boycott of its tenants' stores violates its rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. It concedes, however, that it did not raise its constitutional argument until it petitioned the Supreme Court of California for rehearing. The Board argues the argument is forfeit because Fashion Valley did not raise it during the agency proceeding.

Whether Fashion Valley was required to raise its argument before the Board is not clear. "[T]here is [no] bright-line rule allowing litigants to bypass administrative [process] simply because one or all of their claims

are constitutional in nature," *Marine Mammal Conservancy, Inc. v. Dep't of Agric.*, 134 F.3d 409, 413 (D.C. Cir. 1998), but we have stated we may excuse a failure to exhaust administrative remedies when exhaustion would be "futile" because a claim involves "the constitutionality of a [federal] statutory provision" and would therefore be "beyond [the agency's] competence to decide." *Ryan v. Bentsen*, 12 F.3d 245, 247 (D.C. Cir. 1993). The Board has never said it lacks jurisdiction to decide whether a state law is constitutional, *cf. Univ. of Great Falls*, 331 NLRB No. 188, 2000 WL 1283042 at *2 (2000) (holding it beyond Board's authority to pass upon constitutionality of a federal statute), *vacated on other grounds*, 278 F.3d 1335 (D.C. Cir. 2002), but clearly it has been disinclined to do so. *Waremart Foods*, 337 NLRB 289, 289 (2001) ("[W]e decline the Respondent's invitation to independently evaluate the constitutionality of the State law"), *vacated on other grounds*, 354 F.3d 870 (D.C. Cir. 2004); *Varied Enters. v. Crowder*, 240 NLRB 126, 132 (1979) ("It is the general rule of law that a state statute is presumed to be constitutional until it is repealed by the legislature, or until its nullity is declared by a court of competent jurisdiction").

We need not wade into such murky waters in this case: We have no doubt Fashion Valley forfeited its constitutional argument because it did not raise that argument in its petition for review by this court. *See, e.g., Nat'l Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268, 1273 (D.C. Cir. 1998) ("[Petitioner] failed in its opening brief to this court to contest the Board's finding. . . . Consequently, that claim is waived"). Fashion Valley could and should have argued that if the Board's understanding of California's constitutional guarantee of free speech was correct, then that free speech provision, as

applied, violated the Constitution of the United States. Having that argument before us would have facilitated our decision to certify the question of state law to the Supreme Court of California. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 79, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997) (noting that certification is especially appropriate "when a federal court is asked to invalidate a State's law" because the federal court "risks friction-generating error"). More important, with that argument a part of the case, the Supreme Court of California might have made a special effort to construe the state constitution so as to avoid any potential conflict with federal constitutional law.

Fashion Valley resists this conclusion, contending "it would have been impossible for [it] to have presented, or for the Board to have resolved, U.S. Constitutional issues created by a decision which had not yet been issued." But the decision of the Supreme Court of California did not inject a new constitutional issue into the case. The Board's understanding of California law had been part of this case from the time the Board's General Counsel filed the first brief before the Board; the Supreme Court of California merely confirmed that the interpretation of California law long followed by the Board was correct. *See, e.g., Glendale Assocs.*, 335 NLRB 27 (2001), *enf'd*, 347 F.3d 1145 (9th Cir. 2003); *see also Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980). Fashion Valley had no reason to wait until the Supreme Court of California rendered its decision to pursue its constitutional claim.

Therefore, without deciding whether Fashion Valley was required to raise its constitutional argument before

the Board in the first instance, we hold the argument is forfeit because it was not timely raised before this court. Fashion Valley's petition for review is accordingly denied and the Board's cross-application for enforcement is granted.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 04-1411
Consolidated with 05-1027, 05-1039

FASHION VALLEY MALL, LLL., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

[Filed: Dec. 31, 2007]

ORDER

BEFORE: GINSBURG, Chief Judge, SENTELLE, Circuit Judge, and WILLIAMS, Senior Circuit Judge

Fashion Valley Mall, LLC petitioned for review, and the National Labor Relatiosn Board cross-applied for enforcement, of the order in *Equitable Life Assurance Society of the United States, et al.*, 343 N.L.R.B. 438 (2004). This court certified to the Supreme Court of California the question whether *Fashion Mall, LLC v. NLRB*, 451 F.3d 241, 246-47 (D.C. Cir. 2006).

Upon consideration of the decision of the Supreme Court of California holding Fashion Valley's policy violates the Constitution of California, *Fashion Valley*

Mall, LLC v. NLRB, No. S144753, ____ Cal. Rptr. 3d ____, 2007 WL 4472241 (Dec. 24, 2007), it is

ORDERED, on the court's own motion, that petitioner show cause, within 30 days of the date of this order, why the court should not deny its petition for review and grant the Board's cross-application for enforcement. Petitioner's response to this order may not exceed ten pages.

The Clerk is directed to send a copy of this order to petitioner both by certified mail, return requested, and by first class mail.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ LINDA JONES
LINDA JONES
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 04-1411, 05-1027, 05-1039

FASHION VALLEY MALL, LLC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
GRAPHIC COMMUNICATIONS CONFERENCE,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 432(M), INTERVENOR

Argued: Dec. 13, 2005
Decided: June 16, 2006

ON PETITIONS FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: GINSBURG, Chief Judge, and SENTELLE, Circuit Judge, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Chief Judge GINSBURG.

Concurring opinion by Senior Circuit Judge WILLIAMS.

GINSBURG, Chief Judge.

Fashion Valley Mall, LLC, which is owned and operated by the Equitable Life Assurance Society and ITC Fashion Valley Corporation, allows individuals and organizations to engage in expressive activities on its premises if they first get a permit from the Mall. In order to receive a permit, a party must agree to abide by Fashion Valley's rules and regulations, which prohibit urging consumers to boycott any of the Mall's tenants. The National Labor Relations Board held Fashion Valley violated § 8(a)(1) of the National Labor Relations Act both by maintaining this requirement and by excluding from its premises certain union handbillers.

We hold that whether Fashion Valley violated the Act depends upon whether it had the right, under California law, to maintain and enforce its anti-boycott rule. Because the underlying question is one of state law as to which we can only speculate, we certify that question to the Supreme Court of California for an authoritative answer.

I. Background

Fashion Valley owns a large shopping mall in San Diego, California. The Company permits expressive activities by those who apply for a permit and agree to abide by its regulations. An applicant for a permit must state the purpose of the proposed expressive activity; submit a copy or a description of any materials and signs to be used; list the individual(s) who will participate; provide a $50.00 refundable cleaning deposit; purchase insurance as necessary; and, per Rule 5.6.2, agree to abstain from:

> Urging, or encouraging in any manner, customers not to purchase the merchandise or services offered

by any one or more of the stores or merchants in the shopping center.

In October 1998 approximately 30 "members and supporters" of the Graphic Communications International Union gathered outside the Robinsons-May department store at the Mall to protest actions taken by The San Diego Union-Tribune newspaper. The Union decided to stage to protest there because the store advertises in the paper and is located not far from the paper's premises.

The protestors distributed a handbill addressed" Dear customer of Robinsons-May" that outlined the Union's grievances against the newspaper while making clear "[t]o the employees of Robinsons-May . . . [the] dispute is with The San Diego Union-Tribune. We are not asking you to cease working for your employer." The Union encouraged patrons and employees only to "[c]all Gene Bell, CEO at the Union Tribune." In closing, the handbill mentioned that "Robinsons-May advertises with the Union-Tribune." After about 15 minutes a representative of Fashion Valley approached the protestors, explained that a permit was required for expressive activity, and told them to leave the premises, which they did.

Thereafter, instead of applying for a permit, the Union filed a charge with the Board alleging that Fashion Valley had violated § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), which makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act, to wit,

> . . . the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

29 U.S.C. § 157. An Administrative Law Judge held the Company had violated § 8(a)(1), and the Board affirmed, albeit on a different ground. The Board reasoned:

> [We] look[ ] to State law to ascertain whether an employer has a property right sufficient to deny access to nonemployee union representatives. . . . [A]n employer cannot exclude individuals exercising Section 7 rights if the State law would not allow the employer to exclude the individuals. . . . California law permits the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner rules adopted by the property owner. . . . Rule 5.6.2, however, is essentially a content-based restriction and not a time, place, and manner restriction permitted under California law. . . . [T]he purpose and effect of this rule was to shield [Fashion Valley's] tenants, such as the Robinsons-May department store, from otherwise lawful consumer boycott handbilling. Accordingly, we find [Fashion Valley] violated Section 8(a)(1) by maintaining Rule 5.6.2.

Equitable Life Assur. Soc'y of the United States, et al., 343 N.L.R.B. No. 57 (Oct. 29, 2004) (internal citations and quotations omitted). The Board also held the Company violated § 8(a)(1) by "requir[ing] [the Union's] adherence to [the] unlawful rule" in its permit application

process. *Id.* Consequently, the Board ordered Fashion Valley to rescind Rule 5.6.2.

II. Analysis

Fashion Valley petitions for review, and the Board cross-applies for enforcement, of the order. We enforce a Board order if the factual findings upon which it rests are supported by "substantial evidence," *see United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998), and the Board's interpretation of the Act is reasonable and consistent with applicable precedent, *see Local 702, Int'l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000). When the Board has occasion to interpret state law, however, our review is ordinarily *de novo*. *See Cellwave Tel. Servs. L.P. v. FCC*, 30 F.3d 1533, 1537 (D.C. Cir. 1994) (no deference afforded to agency interpretation of state law absent agency expertise on the subject).

As mentioned, the Board determined Fashion Valley violated § 8(a)(1) in two ways-first, by "maintaining" Rule 5.6.2 and, second, by "enforcing" Rule 5.6.2 against the Union. In the latter regard, the Board reasoned that "inasmuch as the application process requires adherence to an unlawful rule," Fashion Valley "violated Section 8(a)(1) by enforcing Rule 5.6.2, i.e., by requiring the instant application for a permit." 343 N.L.R.B. No. 57.

In *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 112 S. Ct. 841, 117 L. Ed. 2d 79 (1992), the Supreme Court held it is not a violation of the Act for an employer to bar non-employee union organizers from its property "except in the rare case where the inaccessibility of employees makes ineffective the reasonable attempts by non-em-

ployees to communicate with them through the usual channels." *Id.* at 537-38, 112 S. Ct. 841 (emphasis and internal quotations omitted). Under the Board's reading of *Lechmere*, which Fashion Valley does not dispute, an employer may, without violating § 8(a)(1), exclude a nonemployee union representative from its property if and only if it has that right under state law.* *See Waremart Foods v. NLRB*, 354 F.3d 870, 872 (D.C. Cir. 2004).

Our review of the Board's holding in the present case requires us to resolve two further questions: (1) State law aside, did Fashion Valley's requirement of a permit for expressive activity, conditioned as it was upon the Union's agreement not to urge a boycott of any Mall tenant, violate § 8(a)(1) of the Act? (2) If so, was Fashion Valley acting within its rights under California law?

A. The National Labor Relations Act

Fashion Valley does not challenge the Board's position that maintenance of the anti-boycott rule violated § 8(a)(1) if the rule also violated the laws of California (of which more later). The Company does, however, contest the Board's further determination that Fashion Valley violated the Act a second time when it enforced Rule 5.6.2 by conditioning the Union's demonstration upon its adherence to the Rule. In Fashion Valley's view, there is simply not substantial evidence the Union intended to boycott Robinsons-May or any other Mall tenant; therefore the Union would have received a permit had it applied for one. Further to this point, Fashion Valley ar-

* Fashion Valley does not challenge the Board's assumption that because it is an "employer" within the meaning of § 2(2) of the Act, 29 U.S.C. § 152(2), it may be held liable for interfering with the § 7 rights of the employees of another employer with which it has no agency relationship—a matter upon which we express no opinion.

gues that because its permit application "does not highlight Rule 5.6.2, which only consumes three of the 71 lines included in Article 5," the Board cannot reasonably infer the Union "based its refusal to apply for a permit on Rule 5.6.2" nor, hence, that the rule interfered with § 7 rights.

The Board argues that Fashion Valley interfered with the employees' § 7 rights when it sought to force the Union members to forgo a lawful method of protest. If the Board correctly understands that under California law Fashion Valley did not have the right to exclude the demonstrators, then, the Board maintains, the Mall violated § 8(a)(1).

We agree with the Board. Although Fashion Valley is correct that there is not substantial evidence the Union intended to boycott any of the Mall's tenants, nothing in the Act prohibits the Union from carrying out a secondary boycott by means of peaceful handbilling. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 583-87, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988). In subjecting the Union to a permit process that required it to forswear use of this lawful tactic, therefore, Fashion Valley interfered with the employees' rights under § 7 of the Act. That Rule 5.6.2 comprised only three lines of text is irrelevant; it imposed an unlawful condition for obtaining a permit. Enforcement of Rule 5.6.2 therefore violated § 8(a)(1)—unless, that is, the Company had the right under California constitutional law to exclude the employees altogether. *See Waremart*, 354 F.3d at 872.

B. The Constitution of California

The Supreme Court of California has ruled that "the California Constitution protect[s] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899, 910, 153 Cal. Rptr. 854, 860, 592 P.2d 341 (1979). Valley therefore seeks refuge in the "reasonably exercised" limitation upon petitioning, pointing out that the Court in *Pruneyard* also said a private shopping center is not required to host expressive activities that "interfere with normal business operations," 153 Cal. Rptr. at 860-61, 592 P.2d 341, and reasoning that Rule 5.6.2 is lawful because it merely protects the Mall "from disruption of normal business operations and TTT interference with customer convenience." *H-CHH Assocs. v. Citizens for Representative Gov't*, 193 Cal. App. 3d 1193, 1208, 238 Cal. Rptr. 841, 850 (1987); *see also Diamond v. Bland*, 3 Cal. 3d 653, 666, 91 Cal. Rptr. 501, 509, 477 P.2d 733 (1970) (parties may restrict speech in order to prevent "obstruction of or undue interference with normal business operations"); *In re Hoffman*, 67 Cal. 2d 845, 852, 64 Cal. Rptr. 97, 101, 434 P.2d 353 (1967) (protestors not permitted to "interfere[ ] with the conduct of the railroad business").

In the Company's view, that is, the Union's constitutional right to engage in expressive activities does not extend to any activity that interferes with the Mall's primary purpose, namely, "to facilitate the ease of commerce and to promote the business of its merchant tenants." *H-CHH Assocs.*, 238 Cal. Rptr. at 859. According to Fashion Valley, in urging a boycott "what the protestor is asking the customer to do . . . is inherently inconsistent with the dedicated purpose of the shopping

center—the promotion of merchandise and services in the shopping center."

Alternatively, Fashion Valley argues, even if there is no "primary purpose" doctrine in *Pruneyard* and *H-CHH Associates*, the Mall is not a "public forum" under the laws of California and therefore its regulation of expressive activity "need only be reasonable"; yet the Board failed to address the "forum analysis" undertaken by the Supreme Court of California in *Clark v. Burleigh*, 4 Cal.4th 474, 482-489, 14 Cal. Rptr. 2d 455, 460-65, 841 P.2d 975 (1992). Under Fashion Valley's reading of *Clark*, all "property other than streets and parks," and hence the Mall, is a non-public forum.

Finally, Fashion Valley argues that even if the Mall is a public forum, Rule 5.6.2 is a permissible, content-neutral regulation of speech. In *Los Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal.4th 352, 93 Cal. Rptr. 2d 1, 993 P.2d 334 (2000), the Supreme Court of California, defining a "content-neutral" regulation as a restriction "justified without reference to the content of the regulated speech," 93 Cal. Rptr. 2d at 10, 993 P.2d 334, upheld an ordinance that banned "all solicitation in certain defined places" and "aggressive" solicitation in any public place, 93 Cal. Rptr. 2d at 7, 993 P.2d 334. Fashion Valley maintains Rule 5.6.2 is similarly content-neutral because it "prohibits all boycott appeals directed at the Mall's stores or any of the goods or services sold by Mall merchants, regardless of the subject matter of the protest or the protestor's . . . viewpoint."

The Board disagrees with Fashion Valley on all counts. First, the Board argues Fashion Valley misreads *Pruneyard* and *H-CHH Associates* to mean "California has created a forum open to all speech except for

that criticizing the actions of mall tenants." In the Board's view, the reference in *H-CHH Associates* to "freedom from disruption of normal business operations" means only that a shopping mall may impose appropriate time, place, and manner restrictions on expressive activity.

Second, relying upon the Ninth Circuit's decision in *Glendale Associates, Ltd. v. NLRB*, 347 F.3d 1145 (2003), the Board maintains the Mall is indeed a "public forum" under the State Constitution. In *Glendale* the court read *Pruneyard* to mean "privately-owned shopping centers are required to respect individual free speech rights on their premises to the same extent that government entities are bound to observe state and federal free speech rights." *Id.* at 1154. The Board also adverts to our decision in *Waremart*, in which we held that under California law a grocery store could exclude union hand-billers from its parking lot, but in passing noted that in *Pruneyard* the Supreme Court of California "reasoned that shopping centers had become the functional equivalents of 'miniature downtowns' and should be treated as public forums, from which expressive activity cannot be entirely excluded." 354 F.3d at 872.

Finally, the Board argues Rule 5.6.2 is not content-neutral but rather a "content-based restraint on speech because it facially prohibits persons from urging or encouraging, in any manner, customers not to purchase the merchandise or services offered by any Mall tenant." In *Glendale*, the Ninth Circuit held a shopping mall regulation that prohibited the distribution of written materials mentioning by name any "tenant, owner, or manager" of the mall, 347 F.3d at 1147, was not content-neutral be-

cause it was "based on hostility . . . towards the underlying message expressed." *Id.* at 1157-58. So, too, says the Board of Fashion Valley's ban on boycotts: "Indeed the Shopping Mall admits that it maintains the rule because it disfavors speech that may adversely affect its business."

Neither party's argument is fully persuasive. Each marshals the California case law to advantage, but the fact remains that no California court has squarely decided whether a shopping center may lawfully ban from its premises speech urging the public to boycott a tenant. The case closest in point is *UNITE v. Superior Court of Los Angeles County*, 56 Cal. App. 4th 996, 1020, 65 Cal. Rptr. 2d 838, 854 (2d Dist. 1997), which involved" Prohibition[s] Against Interference With Mall Tenants" very similar to Fashion Valley's Rule 5.6.2. Although the court said the anti-boycott rules "could lead to impermissible content-based regulation of expressive activities" in violation of the State Constitution, it did not determine whether the rules actually were unconstitutional because the issue had not been preserved. 65 Cal. Rptr. 2d at 854-55. The Supreme Court of California we think could reasonably agree with either Fashion Valley or the Board.

III. Conclusion

In sum, whether Fashion Valley violated § 8(a)(1) of the Act depends upon whether it could lawfully maintain and enforce an anti-boycott rule—a question no California court has resolved. Because we owe no deference to the Board's interpretation of the Constitution of California and can only guess how the Supreme Court of California would resolve the issue, we shall certify to that court the following question:

Under California law may Fashion Valley maintain and enforce against the Union its Rule 5.6.2?

Pursuant to Rule 29.3 of the California Rules of Court, we may certify "a question of California law if: (1) the decision could determine the outcome of a matter pending . . . and (2) there is no controlling precedent." Cal. R. Ct. 29.8(a). Here, both requirements are met. Accordingly, we shall hold this case in abeyance pending a response from that court.

So ordered.

WILLIAMS, Senior Circuit Judge, concurring in the certification to the Supreme Court of California.

I write separately to underscore what the decision does not hold and to explain where I depart from the majority's reasoning. First, as Maj. Op. at 244 n.* observes, we take no position on whether a firm connected to a labor dispute or relationship only by virtue of being the landlord of a firm (Robinsons-May) that advertises with the disputing employer (the San Diego Union-Tribune) is subject to the duties (vis-á-vis a union seeking to handbill against the Union-Tribune) that the National Labor Relations Act ("NLRA") imposes on "employers" with respect to their own employees (and unions seeking to represent them). Fashion Valley raised no such issue.

Second, the Board found that, assuming that Rule 5.6.2 violated California law, Fashion Valley had violated § 8(a)(1) both "by maintaining" Rule 5.6.2, *Equitable Life Assur. Soc'y of the United States, et al.*, 343 N.L.R.B. No. 57 at 2 (Oct. 29, 2004), and "by enforcing" the rule, *id.* Fashion Valley didn't challenge the Board's "maintenance" finding; thus we reach no holding on that

issue, and the question of California constitutional law is properly before us (and in turn certified).

But Fashion Valley did challenge the Board's conclusion that it (Fashion Valley) violated § 8(a)(1) "by *enforcing* Rule 5.6.2, i.e., by requiring the instant application for a permit," *id.* (emphasis added), and I cannot agree with the court's reliance on that finding—reliance that appears quite unnecessary in view of the Board's unchallenged "maintenance" conclusion. I see three problems with the majority's enforcement analysis. First, the union's proposed leafleting didn't run afoul of Rule 5.6.2. Although the Board incorporated the ALJ's finding that "the Union's October 4 leafleting had, as its primary object, a consumer boycott of the Mall's Robinsons-May store," *id.* at 1, 7, the majority correctly reverses that finding. See Maj. Op. at 244 (agreeing with Fashion Valley's contention "that there is not substantial evidence the Union intended to boycott any of the Mall's tenants," *id.* at 6). It is hard to see how a firm can "enforce" a rule in an episode to which the rule is irrelevant.

Having removed the factual support from the Board's position, the court goes on to affirm on different grounds, disregarding the familiar principles of *Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 87-88, 63 S. Ct. 454, 87 L. Ed. 626 (1943). The court says that "Fashion Valley interfered with the employees' rights" by "subjecting the Union to a permit process that required [the Union] to forswear use of a lawful tactic." Maj. Op. at 244. This evidently rests on the Board's conclusion that "inasmuch as the application process requires adherence to an unlawful rule, [Fashion Valley] *may not enforce it.*" 343 N.L.R.B. No. 57 at

2 (emphasis added). The referent for the word "it" is unclear. The majority reads "it" as the application process. Thus, under the majority's reading, a firm imposing an application requirement "enforces" all of its rules (at least ones that a successful applicant must pledge to obey) anytime that it insists on an application. The majority thus eviscerates much of the distinction between enforcement and maintenance. Fashion Valley maintained Rule 5.6.2, but in no way enforced it.

Alternatively, "it" may refer to Rule 5.6.2. This seems more likely, in view of the Board's finding that the union intended a boycott (which we now reverse), and its later reference to Fashion Valley's "enforcing Rule 5.6.2." *Id.* On this reading, of course, the Board's analysis would founder for want of factual support.

Second, the majority's enforcement theory is further marred by the union's complete unawareness (on the date of the supposed "enforcement") of the very existence of Rule 5.6.2 or its content. The evidence suggests that Fashion Valley excluded the union on October 4 simply because the union refused to apply for a permit, not because Fashion Valley "enforced" Rule 5.6.2 in any non-metaphysical way.

Lastly, the majority notes that under *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 583-87, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988), nothing in the NLRA barred the union from carrying out a secondary boycott by peaceful handbilling. Maj. Op. at 244. True. But of course that tells us little or nothing about the possible affirmative duties of parties subjected to secondary boycotts.

In sum, the majority stretches ordinary language (and the case law) too far—and substitutes its own rea-

soning for the Board's—in concluding that when a company conditions leafleting on submission of an application it automatically "enforces" any rule (that a successful applicant would be required to obey) against persons who have neither contemplated conduct that might violate the rule nor learned of the rule's existence.

APPENDIX D

NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

Case 21–CA–33004

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES AND ITC FASHION VALLEY CORPORATION D/B/A FASHION VALLEY SHOPPING CENTER *AND* GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 432M, AFL–CIO

Oct. 29, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On September 26, 2001, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided

to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[2]

Introduction

The complaint alleges, in pertinent part, that the Respondent violated Section 8(a)(1) by: (1) maintaining a rule prohibiting consumer boycott handbilling, Rule 5.6.2; and (2) enforcing this rule and unlawfully excluding union handbillers at the entrances to the Robinsons-May department store at the Fashion Valley Shopping Center on October 4, 1998. The judge found that the exclusion of the handbillers violated Section 8(a)(1). For the reasons that follow, we agree with this finding.

The judge declined to rule on the separate complaint allegation that the maintenance of the rule prohibiting consumer boycott handbilling also was unlawful. The General Counsel has excepted to the judge's failure to find this additional violation of Section 8(a)(1). For the reasons that follow, we find merit to this exception.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's finding that, under California law, time, place, and manner rules can be applied to labor activity conducted at private shopping malls or large stand-alone shopping facilities in California; and that among the time, place, and manner rules allowed under California law are rules requiring the disclosure of the names of the persons who seek to engage in expressive activity.

[2] We have modified the Order and Notice to more accurately reflect the violations found.

Facts

The judge has fully set out the facts. In brief, the Respondent owns and operates a retail shopping mall in San Diego, California, known as the Fashion Valley Shopping Center (the "Mall"). The Respondent leases space at the Mall to tenants who are engaged in retail sales to the public. The Robinsons-May department store is one of the larger tenants at the Mall and occupies space in a freestanding building at the east end of the Mall. The store is surrounded on three sides by parking areas and on the west side by a separate building housing a Saks Fifth Avenue store and another building housing a number of small retailers. The Respondent retains Jones, Lang, LaSalle Americas, Inc. (La Salle) to manage and operate the Mall on its behalf.

The Respondent has adopted Rules and Regulations applicable to all individuals and organizations seeking to engage in expressive activities at the Mall. Respondent's Rule 5.6.2 expressly prohibits applicants and participants from "impeding, competing, or interfering with the business of one or more of the stores or merchants in the shopping center by . . . urging, or encouraging in any manner, customers not to purchase the merchandise or services offered by one or more of the stores or merchants in the shopping center." Respondent's Rules and Regulations also include an application-permit process for all individuals and organizations seeking to engage in expressive activities at the Mall, which, among other things, requires each applicant to agree to abide by all of the Mall's Rules and Regulations, including Rule 5.6.2. Since the rules were established, the Respondent has required all individuals and organizations

that seek to engage in expressive activity to apply for and receive a permit prior to engaging in the activity.

On October 4, 1998,[3] union members and supporters distributed handbills[4] on the sidewalk outside the entrances to the Robinsons-May department store to persons entering and leaving the store, and to other persons on their way to other Mall stores or parking areas. Shortly after the handbilling began, officials from La Salle stopped the handbilling, and told the handbillers that they were on private property and should have submitted an application for a permit to engage in expressive activity at the Mall. The handbillers were handed the Respondent's standard trespass notice, offered an expressive activity application, and warned that they would be subject to civil litigation and/or arrest if they did not leave. The handbillers promptly ceased their activity, left the Mall's premises, and relocated to public property where they continued to handbill for an additional 15 minutes. On October 22, by letter directed to the Union's counsel, counsel for the Mall sought to compel the Union to complete the Mall's application as a prerequisite to engaging in expressive activity at the Mall.

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[3] All dates hereinafter refer to 1998 unless otherwise indicated.

[4] The Union was involved in a primary labor dispute with the San Diego Union-Tribune newspaper. The handbill highlighted particular aspects of the Union's dispute with the Union-Tribune newspaper, urged Robinsons-May Department Store employees to remain on the job, asked consumers to call the Union-Tribune CEO on behalf of the Union, and concluded: "Robinsons-May advertises with the Union-Tribune."

Analysis

The pertinent principles are set forth in *Glendale Associates*, 335 NLRB 27, 28 (2001), enfd. 347 F.3d 1145 (9th Cir. 2003):

> In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Supreme Court held that an employer may lawfully bar nonemployee union organizers from private property (unless the employees are inaccessible through usual channels). In the absence of a private property interest, however, the Court's holding in *Lechmere* is not controlling. See *Bristol Farms*, 311 NLRB 437, 438 fn. 6 (1993) ("employer's exclusion of union representatives from private property to which the employer lacks a property right entitling it to exclude individuals likewise violated Section 8(a)(1) assuming the union representatives are engaged in Section 7 activities"). See also *Indio Grocery Outlet*, 323 NLRB 1138, 1142 (1997), enfd. sub nom. *NLRB v. Calkins*, 187 F.3d 1080 (9th Cir. 1999).
>
> The Board looks to State law to ascertain whether an employer has a property right sufficient to deny access to nonemployee union representatives. *Bristol Farms*, 311 NLRB at 438. The Board does so because it is State law, not the Act, that creates and defines the employer's property interest. Thus, an employer cannot exclude individuals exercising Section 7 rights if the State law would not allow the employer to exclude the individuals. Id. at 438; *Johnson & Hardin Co.*, 305 NLRB 690 (1991).

California law permits the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner rules adopted by the

property owner. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1979), affd. 447 U.S. 74 (1980); *Glendale, supra*, 335 NLRB at 28. Rule 5.6.2, however, is essentially a content-based restriction and not a time, place, and manner restriction permitted under California law. That is, the rule prohibits speech "urging or encouraging in any manner" customers to boycott one of the shopping center stores. By contrast, there is no evidence in the record explaining how Rule 5.6.2 regulates the time, place, or manner of speech at the Mall. Rather, it appears that the purpose and effect of this rule was to shield the Respondent's tenants, such as the Robinsons-May department store, from otherwise lawful consumer boycott handbilling. Accordingly, we find that the Respondent violated Section 8(a)(1) by maintaining Rule 5.6.2.[5] See *Glendale, supra*.

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[5] In light of our finding above, we find it unnecessary to rely on the judge's finding that Rule 5.6.2 was impermissible under the California law set forth in *Sears, Roebuck & Co. v. San Diego County Dist. Counsel of Carpenters*, 25 Cal. 3d 317 (1979), *In re Lane*, 71 Cal. 2d 872 (1969), and *Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers' Union*, 61 Cal. 2d 766 (1964), and we do not pass on the judge's discussion of those cases. Accordingly, there is no need for us to address the D.C. Circuit's recent decision in *Waremart Foods v. NLRB*, 354 F.3d 870 (D.C. Cir. 2004), questioning whether *Sears*, *Lane*, and *Schwartz-Torrance* remain good law.

We find it unnecessary to pass on the judge's finding that the Respondent unlawfully maintained a rule limiting expressive activities to six "pre-approved" locations in the common areas of the mall. We rely on the following reason. There was no allegation in the complaint challenging this rule and the General Counsel's cross-exceptions make it clear that the General Counsel does not contend that the Respondent violated the Act by maintaining such a rule. In these circumstances, the question of whether such a rule would be unlawful is not before us.

We find, for similar reasons, that the Respondent also violated Section 8(a)(1) by excluding the handbillers on October 4. The Respondent contends that it was entitled to exclude the handbillers because they did not apply for a permit to engage in handbilling, as its rules require. As noted above, though, the Respondent's application-permit process requires each applicant to agree to abide by all its rules and regulations, including Rule 5.6.2, which we have already found to be unlawful. Thus, inasmuch as the application process requires adherence to an unlawful rule, the Respondent may not enforce it. Accordingly, we find that the Respondent violated Section 8(a)(1) by enforcing Rule 5.6.2, i.e., by requiring the instant application for a permit.

AMENDED CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by maintaining and enforcing a rule prohibiting handbilling or other expressive activity which urges, or encourages in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the Fashion Valley Shopping Center.

4. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated Section 8(a)(1) of the Act in any other manner except as specifically found herein.

ORDER

The National Labor Relations Board orders that the Respondent, Equitable Life Assurance Society and ITC Fashion Valley Corporation d/b/a Fashion Valley Shopping Center, San Diego, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a rule prohibiting handbilling or other expressive activity protected by Section 7 of the National Labor Relations Act which urges, or encourages in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the Fashion Valley Shopping Center.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Delete from its rules and regulations, and any other document within its custody and control where such rules may be contained, any rule which prohibits handbilling or other expressive activity protected by Section 7 of the National Labor Relations Act which urges, or encourages in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the Fashion Valley Shopping Center.

(b) Within 14 days after service by the Region, post at the facilities it maintains in connection with the operation of the Fashion Valley Shopping Center in San Diego, California, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 4, 1998.

(c) Within 14 days after service by the Region, sign and return to the Regional Director sufficient copies of the notice for posting by the Union at its facility, if willing, at all places where notices to members and employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 29, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a rule at the Fashion Valley Shopping Center prohibiting handbilling or other expressive activities protected by Section 7 of the National Labor Relations Act which urges, or encourages in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the Fashion Valley Shopping Center.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL modify our rules and regulations for expressive activities at Fashion Valley Shopping Center, and any other document within our custody and control where such rules may be contained, to delete any rule which prohibits handbilling or other expressive activity protected by Section 7 of the National Labor Relations Act which urges, or encourages in any manner, customers not to purchase the merchandise or services offered by any one or more of the stores or merchants in the Fashion Valley Shopping Center.

* * * * *

APPENDIX E

[Seal Omitted]
United States Government
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

August 30, 2006

BY FEDERAL EXPRESS

Frederick K. Ohlrich
Court Administrator and
Clerk of the Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: S144753 - *Fashion Valley Mall v. NLBR* (California Supreme Court)

Dear Mr. Ohlrich:

We have received your August 16, 2006 order, advising us that you have accepted the request of the United States Court of Appeals for the District of Columbia Circuit in *Fashion Valley Mall LLC v. NLRB*, No. 04-1411 (D.C. Cir. June 16, 2006) for an answer to a certified question of law. We appreciate your continuing to keep us advised about the status of the case. Any future correspondence should be directed to Aileen A. Armstrong, who is NLRB counsel of record in the federal court proceedings.

The purpose of this letter is to inform you that the National Labor Relations Board does not intend to participate in the resolution of the certified question. In the Board decision under review by the District of Columbia

Circuit, *Equitable Life Assurance Society*, 343 NLRB No. 57, Board Case No. 21-CA-33004, the Board was merely attempting to give effect to its understanding of California property law. The Board has no institutional interest in how California resolves the state property law question that the District of Columbia Circuit determined was unclear and accordingly certified to this Court.

As suggested by a representative of your office, we have served a copy of this letter on counsel for the parties with an interest in the resolution of the state property law question before the Court. The property owners here are: Fashion Valley Mall, LLC; Equitable Life Assurance Society of the United States; ITC Fashion Valley Corporation d/b/a Fashion Valley Shopping Center. Those seeking access to the property are represented by Graphic Communications International Union, Local 432M, who we understand has moved to intervene in this state court proceeding.

Thank you for your attention in this matter. Please feel free to contact me should you wish to discuss this matter further.

Sincerely,

/s/ AILEEN A. ARMSTRONG
AILEEN A. ARMSTRONG
Deputy Associate General Counsel
National Labor Relations Board
Appellate Court Branch
202-273-2960